SUPREME COURT OF THE UNITED STATES.

No. 369.

TOBIAS S. BRADLEY ET AL., PLAINTIFFS IN ERROR,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 STATE OF ILLINOIS:

Supreme court.—Second grand division.

At a supreme court begun and held for the second grand division of the State of Illinois, at Springfield, on Tuesday, the second day of January, in the year of our Lord one thousand eight hundred and sixty-six.

Present: Honorable Pinkney H. Walker, chief justice; Sidney Breese, associate justice; Charles B. Lawrence, associate justice.

The following proceedings were had in the above-entitled cause:

THE PEOPLE OF THE STATE OF ILLINOIS *vs.* TOBIAS S. BRADLEY, LEWIS HOWELL, and others, shareholders in the First and Second National Banks of Peoria. } Error to the board of supervisors of Peoria county.

2 On the 20th day of December, A. D. 1865, there was filed in the office of the clerk of the supreme court aforesaid, a record of certain proceedings, which record is in the words and figures following:

Proceedings of board of supervisors.

Proceedings of the board of supervisors at their annual session, begun and at Peoria, in Peoria county, in the court-house in said city, on Monday, September 11th, 1865:

TUESDAY, *September* 12, 1865.

Mess. McCoy and Pratt then appeared, and made a statement in relation to assessments of shareholders in the Peoria national banks, and requesting that the board employ counsel and fix a time for hearing arguments in said matters.

On motion of Mr. McCoy, the same were referred to committee on judiciary, to report this afternoon.

TUESDAY, *September* 12—2 o'clock p. m.

Mr. Gibbins, from committee on judiciary, made the following report:

To the board of supervisors, &c.:

3 Your committee on judiciary, to whom was referred the matter of the taxation of shares held by individuals in the national banks in city of Peoria, having had the same under advisement, beg leave to report, that we find the question under consideration resolved to this: Are the shares owned by individuals in banking associations, organized under late acts of Congress providing a national currency, secured by a pledge of U. S. bonds, liable to assessment and taxation for State and county purposes, where all the capital stock of said bank is invested in U. S. bonds?

That the representatives and att'ys of the banks propose that the board invite his honor, Judge Williamson, to sit some evening with

the board, and hear the arguments of counsel for the banks and for the county, and, under the advice of said judge, to take some action pro and con in the matter; said decision not to be binding on either party.

That your committee accepted said proposition, and had called upon Judge Williamson, who kindly agreed to meet with the board on Wednesday evening at 7 o'clock, and your committee have employed Mess. Ingersoll and Peterbaugh to represent the county in said hearing.

Your committee would therefore recommend that the board meet in the court-room with said judge, for adjudication of said matter, to-morrow evening.

Respet. submitted,

A. M. GIBBONS, *Ch'n.*

4 Said report, on motion of Mr. Greer, was adopted, and recommendations thereof concurred in by board.

WEDNESDAY, *Sept 13th*, '65—7½ o'clock p. m.

Board met pursuant to adjournment.

Present: Same as yesterday a. m. Also his honor, Marion Williamson, judge of the circuit court; L. G. Pratt and Alexander McCoy, atty's for the shareholders in the 1st and 2d National Banks of Peoria, and R. G. Ingersoll and S. Peterbaugh, atty's for the county, appeared before the board, and argued the following question, it being the special order at this time: "Are the shares owned by individuals in banking associations, organized under the late acts of Congress providing a national currency, secured by a pledge of United States bonds, liable to assessment and taxation for State and county purposes, where all the capital stock of said bank is invested in United States bonds."

After hearing the arguments of counsel, on motion of Mr. Wilder, the board adjourned until to-morrow morning at 9 o'clock.

5 SATURDAY, *September 16th*.

Hon. Mr. Williamson, judge of circuit court, appeared before the board, and stated that he had heard, with the board, the arguments of counsel as to the question of taxing shares in national banks, and gave his opinion that shares in such banks were not taxable.

Whereupon Mr. Jenkins moved that the clerk extend the tax on the shares of national banks as assessed by the assessor of Peoria city.

The yeas and nays being demanded, said motion was decided in the negative.

Those voting in the affirmative are—

Messrs. Armson, Jenkins, Scholl, and Stewart—4.

Those voting in the negative are—

Messrs. Armstrong, Eichorn, Emory, Evans, Fulton, Gibbons, Green, Grier, Hakes, Matson, McCoy, Oertley, Pulsipher, Reinhart, Shepherd, Slocum, Tait, Thompson, Wells, and Wilder—Total, 20.

Whereupon Mr. Gibbons introduced the following resolution:

Resolved, That the tax on shares of the national banks of the city of Peoria be abated, and the clerk be directed to strike from the assessor's books of Peoria township the amount of shares so assessed.

Which resolution, on motion of Mr. Grier, was adopted.

On assessment for taxes.—Board of supervisors, Sept. term, 1865.

6 THE PEOPLE, &c.,,
vs.
TOBIAS S. BRADLEY, LEWIS HOWELL, and others, shareholders of the 1st and 2d National Banks of Peoria.

To the honorable the board of supervisors of the county of Peoria, State of Illinois, at their annual session, A. D. 1865:

The said Bradley, Howell, and others, shareholders of the First and Second National Banks of Peoria, by their attorneys, come and respectfully represent to your honorable body that, as shareholders in said banks, they have been respectively assessed by the assessor of the town of Peoria upon all the shares of stock in said banks held by them respectively at the par value thereof.

Your petitioners, the said shareholders, further represent that they are advised by counsel, and verily believe they are not legally liable to pay any tax whatever levied upon the shares in said banks, or upon your petitioners on account of said shares, and by virtue of State or municipal authority.

7 Your petitioners, therefore, respectfully object and protest against the levying of any tax whatever by your honorable body for State and county purposes upon the said shares of stock, or upon your petitioners as the owners thereof. And your petitioners pray that your honorable body may correct the assessment list of the town of Peoria by striking therefrom all assessment upon said shares of stock held by your petitioners in the said First and Second National Banks of Peoria, or upon your petitioners for or on account thereof.

And, as in duty bound, your petitioners will ever pray, &c.

And for causes of protest and objection against said assessment of said shares, your petitioners show the following:

1st. By the national bank law of 1864, (sec. 41,) the banks, in their corporate capacity, are exempt from taxation by State or municipal authority; but it is provided that nothing in the act shall prevent the shares of said banks being included in the assessment of the personal property of the persons owning the same, but such shares shall not be taxed at a greater rate than is imposed upon the shares of State banks of the State where the institution is located.

8 2d. By the State bank law of 1851 (sec. 10, page 200, Purple's statutes) taxes are to be levied on the State banks in their corporate capacity, and shareholders are expressly exempt from taxation.

3d. By amended bank law of 1857 (sec. 6, laws 1857, page 25) the capital stock and surplus profits of the State banks are taxed as other property against the bank in its corporate capacity.

4th. There is nowhere any provision for taxing the shares of the State banks of Illinois in any manner, either as against the bank or against the shareholder.

The case then is this: National bank shares may be taxed only to the extent that State bank shares are taxed, and in this State bank shares not taxed at all.

Before national bank shares can be taxed in Illinois, the legislature of the State must pass an act authorizing the taxation of the shares of the State banks.

But your petitioners would further show that even supposing the legislature of the State to have passed an enabling act authorizing the taxation of the shares of the State banks, and thereby authorizing the taxing of the shares of national banks to the extent permitted in any case by the act of Congress, still the shareholders of the 1st and Second National Banks of Peoria could not be legally assessed upon their shares, for the following reasons:

9 1st. The entire capital stocks and accumulated profits of said banks from their first organization to the present time have been loaned to the United States government; that is, invested in bonds and securities of the United States issued and sold by the government thereof since February 25th, 1862; all of which said bonds and securities were, by special act of Congress, approved said 25th of Feb., 1862, declared to be exempt from taxation by or under state authority, whether held by individual corporations or associations within the United States.—(Act of Congress, sec. 2 p. 49.)

2d. The law of Congress exempting from taxation all said bonds and securities, whether held by individuals, corporations, or associations, was passed Feb. 25, 1862, and is still unrepealed. The law permitting the taxation of shares in national banks was not passed till June 3, 1864.

After Feb. 25, 1862, and before June 3d, 1864, the First and Second National Banks of Peoria invested, as they had a right to do, their entire capital, stocks, and undivided profits in these bonds, and in doing so became entitled to hold said bonds free from taxation by or under State authority for the period they were still to run.

10 But it cannot be said Congress intended indirectly to repeal, alter, or in any manner affect the operation of the law of 1862 for a year. National banks had been investing in these bonds induced by the assurance of freedom from taxation, and to change their rights in that respect would be simply repealing a contract or repudiation.

We say the manifest design of Congress was to permit the States to tax national bank shares only to the extent they were not invested in government securities.

This construction only can give force and effect to both acts of Congress, for if it be held that the shares that we invested in United States bonds can be taxed, then is the law of 1862 repealed as to all bonds held by national banks, and the conclusion is, government re-

pudiates its contracts with its own agents, and aids and holds them good as to individuals, other corporations, and the rest of mankind.

3d. The law is well settled that a tax on the shares on capital stock of a bank is a tax on the property in which the capital stock is invested.

Hence it follows if the property in which the capital stock is invested is exempt from taxation, then the capital stock and all the shares thereof are also exempt.—(See State of New York *vs.* com'r of taxes, law register, M'ch, '65, page 277; Whiting *vs.* City of Madison, 23d Indiana, p. 336; Bank Tax Com., 2 Wallace p. 200;
11 Bank of Commerce *vs.* N. Y. city, 2d Black, page 620.)

4th. The proviso of section 41 of the bank law cannot be construed as a provision for taxation, but only a provision "that nothing contained in that act shall be construed to prevent" the States taxing shareholders. In other words the act would leave the question of taxing national bank shares by the States as if section 41 had not been passed.

By the proviso Congress virtually says: "by this act we will not interfere with your rights to tax shares as they existed before this act was passed, except that you shall not tax these shares at a greater rate than you tax the shares of your own banks."

Now, the law has been settled for many years that these shares could not be taxed if they were invested in government securities before the passage of this act.

5th. It is a familiar rule of law that all laws for the assessment and collection of taxes are to be strictly construed; is other words, the law must give a clear and unequivocal right to tax the property sought to be made liable, and must provide a means, by which the tax shall be levied and collected, and such provision must be strictly followed.—(Heat's Com. 2d V., page 331.)

12 *Exhibit A and affidavit of Lewis Howell.*

Statement of condition of the Second National Bank of Peoria, May 1st, 1865.

Assets.		Liabilities.	
Cash on hand	$181,294 73	Capital stock paid in	$200,000 00
Due from banks and bankers.	228,174 34	Due to depositors on ac	477,926 67
Bills receivable discounted	245,224 22	Circulating notes outstanding.	192,410 00
Due from depositors	1,137 65	Due U. S. treasurer on deposits	92,788 87
U. S bonds, 5-20's and 10-40's	223,000 00	Surplus fund	2,218 76
U. S. 6 per cent. of '81	30,000 00	Due other banks, bankers & Co's	12,459 25
U. S. 7-10's, 3 year on notes.	45,000 00	Undivided profits	32,134 92
U. S. 7-30's on hand for sale.	53,200 00		
Office furniture cost	903 18		
Internal revenue stamps	2,004 35		
	1,009,938 47		1,009,938 47

13 STATE OF ILLINOIS, *Peoria County, ss:*

Lewis Howell, being first duly sworn, doth depose and say he is, and ever since the first organization thereof has been, the president of the Second National Bank of Peoria, in said county and State.

That as such president he has charge of the funds and finances of said bank, and knows what has been the disposition and investment of the funds, and the condition thereof from the time of its organization to the present time.

Deponent further says he has carefully examined the statement hereto attached, marked "A," and made part of this affidavit, that he has compared the said statement with the books of the bank, and that said statement contains a full, true, and perfect exhibit of the condition of said bank on the first day of May, A. D. 1865. That the column marked "assets" in said statement contains a list of all the property and estate, whether personal or mixed, and all the rights, credits, and effects belonging to or under the control of said bank—while the column marked "liabilities" contains a true statement of the indebtedness of the same on said first day of May, A. D. 1865.

14 Deponent further says that the entire capital stock paid in of said bank, together with the entire accumulated profits are now, and ever since the organization of said bank have been, loaned to the United States government, to wit: invested in the bonds of the United States, issued and sold by the government of the United States to raise and borrow money to carry on war, suppress rebellion, &c., under and by virtue of acts of Congress of the United States, and all of which bonds were issued by the United States government, and sold in the market subsequent to the act of Congress of February 25, 1862, authorizing a loan for war purposes, &c.

Deponent further says that no part or parcel of said capital stock paid in now of the accumulated savings or profits of said bank have ever been issued for any other purpose, or invested in any other way than as before stated; but that, on the contrary, as fast as said capital stock was by the shareholders of said bank paid in thereto, and as fast as said bank has accumulated earnings on undivided profits, such capital stock paid in and such accumulated earnings have been at once invested in said bonds of the United States as a permanent investment, and ever since have been and still are kept thus invested. That on said first day of May, 1865, and for a long period prior thereto, said bank held (and still holds) as a permanent investment of United States bonds known as 5–20's, $123,000 00; of United States bonds known as 10–40's, $100,000 00; of United States bonds known as 6 p'c. of '81, $30,000; of United States bonds known

15 as 7–30's, $45,000—making a total of $298,000 00.

Said amount being largely in excess of the capital stock, and accumulated earnings of said bank which on said day amounted to capital stock paid in.....	$200,000 00
Surplus fund and undivided profits.....	34,353 68
	234,353 68

Deponent further says that by a resolution of the board of directors of said bank, passed at its first organization, it was permitted to subscribers to the capital stock to pay their said subscriptions in bonds of the United States (at par value) issued under the act of Feb'y 25, 1862. That under said permission many of the shareholders did pay their subscriptions to the capital stock of said bank in said bonds, which said bonds were received by the bank, and are still held by it as part of the permanent investment aforesaid. Deponent further says said bank is not the owner of any real estate whatever, nor of any other property, except as specified in said statement, marked A, and as deponent is advised by counsel, and verily believes, said bank was not on the first day of May, 1865, nor at any time before that day, possessed of any property whatever liable to taxation by or under State authority.

16 Deponent further says that on the 3d day of June, A. D. 1864, the said Second National Bank of Peoria had its entire capital stock paid in and its entire accumulated profits invested in the bonds aforesaid, and such investment has remained till this day. And further deponent says not.

LEWIS HOWELL.

Subscribed and sworn to before me, this 12th day of Sept., 1865.
[SEAL.] WALTER B. HOTCHKISS,
Notary Public.

[Rev. stamp, five cents.

17 *Exhibit A to affidavit of Tobias S. Bradley.*

Statement of the condition of the First National Bank of Peoria, May 1st, 1865.

Assets.		Liabilities.	
Cash on hand	$80,534 56	Due depositors	$397,155 09
Due from banks and bankers	180,871 43	Capital stock paid in	200,000 00
Bills receivable	230,259 08	Surplus fund	6,000 00
U. S. bonds, 5-20 and 10-40, permanent investment	315,000 00	Circulating notes	198,000 00
U. S. 7-30 3-year notes	78,600 00	Undivided profits	23,600 67
Expense acc't	955 95	Due treas. of U. S.	80,211 76
Premium acc't	4,481 05		
Lease and outfit acc't	3,800 00		
Revenue stamps	7,739 10		
Postal currency	2,726 35		
	904,967 52		904,967 52

18 STATE OF ILLINOIS, *Peoria County, ss:*

Tobias S. Bradley, being first duly sworn, doth depose and say he is, and ever since the first organization thereof has been, the president of the First National Bank of Peoria, in said county and State.

That as such president he has charge of the funds and finances of said bank, and knows what has been the disposition and investment of its funds, and the condition thereof from the time of its organization to the present time.

Deponent further says he has carefully examined the statement hereto attached, marked A, and made part of this affidavit, that he has compared the said statement with the books of the said bank, and that said statement contains a full, true, and perfect exhibit of the condition of said bank on the first day of May, A. D. 1865.

That the column marked assets in said statement contains a list of all the property and estate, whether personal or mixed, and all the rights, credits, and effects belonging to or under the control of said bank, while the column marked liabilities contains a true statement of the indebtedness of the same on said first day of May, A. D. 1865.

Deponent further says that the entire capital stock paid in
19 of said bank, together with its entire accumulated profits, are now, and ever since the organization of said bank have been, loaned to the United States government, to wit: invested in the bonds of the United States issued and sold by the government of the United States to raise and borrow money to carry on war, suppress rebellion, &c., under and by virtue of acts of Congress of the United States; and all of which bonds were issued by the United States government and sold in the market subsequent to the act of Congress of February 25th, 1862, authorizing a loan for war purposes, &c.

Deponent further says no part or parcel of said capital stock paid in, nor of the accumulated profits or earnings of said bank, have ever been used for any other purpose, or invested in any other way than as before stated; but that on the contrary as fast as said capital stock was by the shareholders of said bank paid in thereto, and as fast as said bank has accumulated earnings or undivided profits, such capital stock paid in and such accumulated earnings have been at once invested in said bonds of the United States as a permanent investment, and ever since have been and still are kept thus invested.

That on said first day of May, 1865, and for a long period prior thereto, said bank held, and still holds, as a permanent invest-
20 ment of United States bonds known as 5–20's.. $215,000 00
Of U. S. bonds known as 10–40's..... 100,000 00

Making a total of..... 315,000 00

This amount being largely in excess of the capital stock and accumulated earnings of said bank, which on said day amounted to—

Capital stock paid in.....	$200,000 00
Surplus fund and undivided profits.....	29,600 67
Total.....	229,600 67

Deponent further says that it was permitted to subscribers to the capital stock of said bank to pay their said subscriptions in bonds of the United States (at par value) issued under the act of February 25, 1862. That under said permission many of the shareholders did pay their subscriptions to the capital stock of said bank in said bonds, which said bonds were received by the bank and are still held by it as part of the permanent investment aforesaid.

Deponent further says said bank is not the owner of any real estate whatever, nor of any other property except as specified in said statement, marked A, and as deponent is advised by counsel and verily believes, said bank was not on the first day of May, 1865, nor at any time before that day, possessed of any property whatever liable to taxation by order or under State authority.

21 Deponent further says, that on the third day of June, A. D. 1864, the said First National Bank of Peoria had its entire capital stock paid in, and its entire accumulated profits invested in bonds aforesaid, and such investment has remained till this day.

TOBIAS S. BRADLEY, *Pres't.*

Subscribed and sworn to before me this 11th day of September, A. D. 1865.

[SEAL.] WILLIAM E. STONE,
Notary Public.

[Rev. stamp, five cents.]

In the county court of Peoria county, State of Illinois.

STATE OF ILLINOIS, *Peoria County, ss :*

I, Charles Kettelle, clerk of the county court in and for said county of Peoria, and State of Illinois, do hereby certify that I have compared the foregoing copy of the petition and affidavits of L. Howell and T. Bradley, presidents of the 2d and 1st National Banks of the city of Peoria, and the proceedings of the board of supervisors of said county, in relation to the taxation of shares in national bank, with the original record thereof, remaining in my office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

22 In testimony whereof I have hereunto set my hand and official seal, at Peoria, this 21st day of September, A. D. 1865.

[SEAL.] CHARLES KETTELLE,
Clerk County Court.

[Rev. stamp, 5 cts.]

23 STATE OF ILLINOIS, AUDITOR'S OFFICE,
Springfield, December 4th, 1865.

To the clerk of the county court of Peoria county, Peoria, Illinois:

DEAR SIR: The record of the proceedings of the board of supervisors of Peoria county, in the matter of the application of Tobias S. Bradley, Lewis Howell, and others, shareholders of the First and Second National Banks of Peoria, to said board of supervisors, alleging erroneous and illegal assessment of the shares of stock respectively held by said applicants in the banks aforesaid, was duly received by me, and the matters thereof fully considered.

Believing that the board of supervisors erred in deciding that the shares of stock aforesaid were not liable to taxation at the time of making the assessment in question, I hereby notify you of my disapproval of the decision of the board, and of my objections thereto. This was a decision of the board of supervisors of Peoria county, Illinois, in a case wherein the owners of shares of the capital stock of the First National Bank and the Second National Bank of Peoria applied to said board as provided by section 33 of the act of
24 February 12th, 1853, "for the assessment of property, and the collection of taxes in counties adopting the township organization law," for an abatement of the assessment against them for the year 1865 of the value of moneys invested in such shares, which decision was to the effect that such shares are exempt from taxation, and not liable to assessment.

I object to this decision as not being in accordance with law:

First. Because the money invested in such shares is clearly within the meaning of the term "investment in stocks," as defined in section 2 of said act of February 12th, 1853, being an investment in the stock of an "association, corporation, or joint stock company, the stock or capital of which is, or may be, divided into shares, which are transferable by the owner without the consent of the other parties or stockholders, for the taxation of which no special provision is made by this act." The value of moneys so invested being required by section 7 of the same act to be listed and taxed to same as other personal property.

Second. Because the rate of taxation sought to be levied on these shares is no greater that would be levied on the capital stock
25 or shares in the same of banks chartered under the laws of the State of Illinois, and therefore not in contravention of the provisions of section 41 of the act of Congress of June 3d, 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," (page 99, Statutes at Large, 1863–1864,) which declares: "That nothing in the act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. *Provided further*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located."

The law of Illinois taxes the whole capital stock in State banks against the banks themselves, thus including all the shares in one assessment against the bank, instead of dividing the same into sep-
26 arate assessments, against the several holders; this fully meets the requirement of the act of Congress as to the rate of taxa-

tion; the assessment of the whole capital stock in one amount or the several shares of the same in the hands of different owners, is a question of form only, and does not vary the result as to the rate or amount of the tax to be levied.

Third. Because the taxation sought to be effected is not in contravention of any of any of the laws of Congress exempting United States bonds from taxation under State authority. The property sought to be taxed is, in no sense, United States bonds, but is the value of the moneys invested in shares of the capital stock of the corporations or associations known as national banks, being the property of individuals, and not the capital or assets of the banks themselves, which may be in part, or in whole, composed of United States bonds, but which is not sought to be reached or affected by this assessment. The "capital stock" of a bank or other corporation represents the amount of money paid or contributed by shareholders to its formation; its assets or capital (not "capital stock") is the same money so received, or property purchased therewith by the bank, together with such other money or property as the bank
27 may have accumulated in addition to original capital by business operations. The "capital stock" is the property of the individuals who subscribed and paid the same at the organization of the corporation, or their assigns. The capital or assets is the property of the bank itself.

I deem the "capital stock" to be taxable property under the laws of this State, and shall therefore apply to the supreme court of this State, at the next term thereof, to be holden in the city of Springfield, commencing on the first Tuesday after the first Monday of January, in the year 1866, for an order to set aside and reverse the decision of the board of supervisors in this case.

Given under my hand and official seal, at my office, in the city of Springfield, this fourth day of December, A. D. 1865.

(Signed) ORLIN H. MINER, [L. S.]
Auditor P. A.

28 AUDITOR'S OFFICE, ILLINOIS,
Springfield, December 20, 1865.

To the honorable supreme court of the State of Illinois, sitting for the second grand division of said State:

The undersigned, auditor of public accounts of the State of Illinois certifies, to said court that the foregoing and attached transcript of a record certified by the county clerk of Peoria county as the record of the proceedings of the board of supervisors of said county in the matter of the application of Tobias S. Bradley, Lewis Howell, and others, shareholders in the First and Second National Banks of Peoria to said board, for an abatement of the assessment against them in respect of the value of stock held by them respectively in said banks, embraces a statement of the facts as certified to me by said clerk.

The undersigned having disapproved of the decision of said board of supervisors, ordering the abatement of said assessment, believing

that said board has erred in deciding that said property was not liable to taxation at the time of making said assessment, he advised the clerk of his objections and disapproval aforesaid, and gave notice to said clerk that he would apply to the supreme court at the
29 term thereof next to be held (January term, A. D. 1866) for an order of said court to set aside and reverse said decision of the board of supervisors. And the undersigned certifies herewith a copy of said notice to said clerk, and of the objections made by him to said decision, and communicated to said clerk. And the undersigned asks, upon the record and facts certified, that the order and decision of said board of supervisors be set aside and reversed.

All of which is respectfully submitted.

Certified under my hand and seal of my office, at Springfield, this 20th day of December, A. D. 1865.

[L. S.] ORLIN H. MINER,
Auditor of Public Accounts of the State of Illinois.

30 Upon the foregoing record, so filed in said supreme court as aforesaid, is an assignment of error in the words and figures following:

PEOPLE
vs.
TOBIAS S. BRADLEY *et al.*

Now comes the said people and assign for error, that the judgment and order of the board of supervisors of Peoria county, abating the assessment of taxes of def'ts in respect of their shares of national bank stock, was erroneous.

HAY, *for Pl'ff.*

And upon the 4th day of January, A. D. 1866, at said January term, A. D. 1866, of said supreme court, an order of court was entered of record in said cause in the words and figures following:

Error to the board of supervisors of Peoria county.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
TOBIAS S. BRADLEY *et al.*

On this day come defendants, by McCoy, attorney, and
31 enter appearance, and, on motion, submit said cause on their behalf on briefs and arguments to be filed; likewise come plaintiffs, by Hay, attorney, and submit said cause on their behalf on abstracts and briefs, and the court take time to consider thereof.

And on the 24th day of April, A. D. 1866, in vacation, as of said January term, A. D. 1866, of said supreme court, a final judgment was rendered in said cause by said supreme court, and entered upon the records of said court, which is in the word and figures following:

Error to the board of supervisors of Peoria county.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
TOBIAS S. BRADLEY, LEWIS HOWELL, and others, shareholders in the First and Second National Banks of Peoria.

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error,
32 and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the order of the board of supervisors of Peoria county aforesaid, there is manifest error. Therefore it is considered by the court, that for that error, and others in the record and proceedings aforesaid, the said order of said board of supervisors, in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the said board of supervisors for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that the said plaintiffs in error recover of and from the said defendants in error costs by them in this behalf expended, and that they have execution therefor.

33 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Illinois, before you, between Tobias S. Bradley and Lewis Howell, for themselves and others, the shareholders of the First and Second National Banks of Peoria, and the people of the State of Illinois, a manifest error hath happened to the great damage of the said Tobias S. Bradley, Lewis Howell, and others, the shareholders of the First and Second National Banks of Peoria, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

34 Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this second day of April, in the year of our Lord one thousand eight hundred and sixty six, and of the independence of the United States the ninetieth.

[SEAL.] P. S. ENOS, *Clerk*.

35 On the first day May, A. D. 1866, there was filed in the office of the clerk of the supreme court aforsaid a stipulation, a copy of which is as follows:

In error to the supreme court of the State of Illinois.

TOBIAS S. BRADLEY and LEWIS HOWELL, for themselves and others, the shareholders of the First and Second National Banks of Peoria,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.

In the Supreme Court of the United States.

It is hereby agreed that the amount in controversy in this cause exceeds the sum of two thousand dollars, exclusive of costs.

M. HAY, *Att'y for People.*

Springfield, April 30th, 1866.

36 And on the said first day of May, A. D. 1866, there was also filed in the office of the clerk of the supreme court aforesaid, a citation issued in said cause, a copy of which is as follows:

UNITED STATES OF AMERICA, *ss:*

To the people of the State of Illinois, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein Tobias S. Bradley and Lewis Howell, for themselves and others, the shareholders of the First and Second National Banks of Peoria, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Pinkney H. Walker, chief justice of the supreme court of the State of Illinois, this 28th day of April, in the year of our Lord 1866.

P. H. WALKER,
Chief Justice of the Supreme Court of the State of Illinois.

37 And upon the citation mentioned above appears an indorsement as follows:

Service of the within citation acknowledged, May 1st, 1866.

M. HAY, *Att'y for People.*

38 And on the said first day of May, A. D. 1866, there was also filed in said cause, in the office of the clerk of the Supreme Court aforesaid, a bond, a copy of which is as follows:

Supreme Court of the United States.

TOBIAS S. BRADLEY, LEWIS HOWELL, and others, shareholders of the First and Second National Banks of Peoria,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
} In error.

Know all men by these presents, that we, Tobias S. Bradley, Lewis Howell, Henry Lightner, Mathew Griswold, Charles P. King, and Louis Grant Pratt, are held and firmly bound unto the above people of the State of Illinois, in the sum of twenty thousand dollars, ($20,000,) to be paid to the said people of the State of Illinois, their heirs, executors, successors, or representatives. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this the 28th day of April, A. D. 1866.

Whereas the above-bounden Tobias S. Bradley and Lewis Howell, for themselves and others, the shareholders of the First and
39 Second National Banks of Peoria, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Illinois, on the 24th day of April, A. D. 1866. Now, therefore, the condition of this obligation is such, that if the above-named Tobias S. Bradley and Lewis Howell, for themselves and others, the shareholders of the First and Second National Banks of Peoria, shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] TOBIAS S. BRADLEY.
[SEAL.] LOUIS HOWELL.
[SEAL.] HENRY LIGHTNER.
[SEAL.] M. GRISWOLD.
[SEAL.] CHARLES P. KING.
[SEAL.] LOUIS GRANT PRATT.

Sealed and delivered in presence of—

A. McCOY.

Taken and approved by the undersigned this the 28th day of April, A. D. 1866.

P. H. WALKER, *Ch. J.*

40 STATE OF ILLINOIS, *Supreme Court, Second Grand Division:*

I, William A. Turney, clerk of said supreme court, hereby certify the foregoing to be a true and correct transcript of the record, orders

of court, judgment, stipulation, citation, and bond, in the said supreme court, in a cause lately depending in said court, wherein the people of the State of Illinois were plaintiffs, and Tobias S. Bradley, Lewis Howell, and others, shareholders of the First and Second National Banks of Peoria, Illinois, were defendants, as the same appear of record and from the files of my office.

In testimony whereof I hereunto set my hand and affix the seal of said supreme court, at Springfield, this eighteenth day of September, A. D. 1866.

[L. S.] WM. A. TURNEY,
Cl'k Supreme Court, 2d Gr'd Div., Illinois.

41 *Assignment of errors.*

Supreme Court of the United States.—December term, 1866.

UNITED STATES OF AMERICA, *ss:*

TOBIAS S. BRADLEY, LEWIS HOWELL, *et al.*, shareholders in the First and Second National Banks of Peoria, plaintiffs in error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.

And now the said Tobias S. Bradley, Lewis Howell, and others, shareholders in the First and Second National Banks of Peoria, and plaintiffs in error herein, come and say that in the record and proceedings aforesaid there is manifest error in this, that is to say—

1st. The supreme court of the State of Illinois, second grand division, erred in reversing, annulling, and setting aside the order
42 of the board of supervisors of Peoria county.

2d. That said court erred in rendering judgment against the said plaintiffs in error, and in favor of the said defendants in error.

3d. That said court erred in not sustaining the said order of the board of supervisors of Peoria county, and rendering judgment in favor of the said plaintiffs in error, (the said Tobias S. Bradley, Lewis Howell, and others, the shareholders in the First and Second National Banks of Peoria.)

By reason whereof the said plaintiffs in error pray that said judgment may be reversed, &c.

WEST DEXTER,
For Pl'ffs in Error.

UNITED STATES

SUPREME COURT,

DECEMBER TERM, A. D. 1866.

TOBIAS S. BRADLEY, LEWIS HOWELL, ET AL.,
THE SHAREHOLDERS OF THE FIRST AND SECOND NATIONAL BANKS OF PEORIA,
PLAINTIFFS IN ERROR,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR,

BY

WALKER & DEXTER.

CHICAGO:
JAMESON & MORSE, PRINTERS, 12 & 14 LA SALLE STREET.
1867.

UNITED STATES SUPREME COURT,

DECEMBER TERM, A. D. 1866.

TOBIAS S. BRADLEY, LEWIS HOWELL, ET AL.,
The Shareholders of the First and Second National Banks of Peoria,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.
NO. 369.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

It appears from the record filed in this case, that the Second National Bank of Peoria, in the State of Illinois, became incorporated and was organized under the Act of Congress approved Feb. 25th, 1863, commonly known as the National Currency or Bank Act, and commenced business prior to the 3d of June, A. D.
[4] 1864, at which time the present National Bank Act was approved and became operative, with a capital stock of two hundred thousand dollars, which was divided into shares.

That subsequent to the 25th day of February, 1862, and
[6, 7] before the 3d of June, 1864, the capital stock was all paid in by the subscribers, much of it in bonds of the United States, which they had, or had procured for that purpose, and the balance

of it in cash, which was, by said bank, immediately invested in Government bonds.

That from the time of the organization of the bank, to May 1st, 1865, all the surplus funds and undivided profits were invested and kept invested in the bonds of the United States.

That on the 1st day of May, 1865, the bank held, and for a long time previously thereto had held, government bonds, as follows:

[6] United States bonds, known as 5-20's.....$123,000
" " " " 10-40's..... 100,000
" " " " 7-30's..... 45,000
" " " " 6 pr. ct., 1881.... 30,000

$298,000

Of these bonds there were invested in them the capital stock of $200,000
The surplus funds and undivided profits 34,353 $234,353

Making.....$63,647

invested in government bonds over and above its capital stock, surplus funds and undivided profits.

That the Plaintiffs in Error, Lewis Howell and others, on the 1st day of May, 1865, were the owners of the capital stock of the Second National Bank of Peoria, and that the Assessor of the town of Peoria on that day, or as of that day, assessed the shares of said bank, held by said Howell and others, the shareholders of said bank, to them, at the par value thereof.

That the said Howell and others, feeling themselves aggrieved by such assessment, applied, by petition, to the Board of
[1, 2] Supervisors of the County of Peoria, at the meeting held in September, 1865, to correct the assessment list for

the town of Peoria, by striking therefrom all assessments upon the said shares of stock held by them.

That the said Board of Supervisors at said meeting, upon full consideration of the matter, held that said shares were not [*2, 3*] subject to taxation, granted the prayer of the petition, and ordered the assessment against said petitioners upon the shares of the stock held by them respectively, to be stricken from said lists.

That the Clerk of said Board thereupon made out and forwarded to the Hon. O. C. Miner, State Auditor, a statement of the facts of the case, for his approval or disapproval of the action of said Board.

That the Auditor received the statement and on the [*9, 10, 11*] fourth day of September, A. D. 1865, declined to approve the action of said Board, advised the Clerk of said Board of his objections to the decision made by it, and gave him notice that he should apply to the Supreme Court of the State of Illinois, at the January term thereof, A. D. 1866, for an order to set aside and reverse the decision of the Board of Supervisors.

That the case was accordingly brought into the Supreme Court of the State of Illinois by said Auditor under the provision of section thirty-three of the Act of the General Assembly of the State of Illinois, approved February 12th, 1853, relating to the assessment of property in Counties adopting the Township organization, which said section is in the language following:

"Each town assessor shall on or before the first day of July, annually, make out and deliver to the Clerk of his County, in tabular form and alphabetical order, the name of the several persons, companies or corporations in whose names any personal property, moneys or credits, shall have been listed in his County, and sepa-

rately in appropriate columns, opposite each name, the number and value of all articles of personal property enumerated in this Act, the value of all non-enumerated articles of personal property, other than the stock of merchants and manufacturers, the value of merchants' and manufacturers' stock, and the value of the moneys and credits listed by said persons. If any person is assessed on property which he believes is not properly and legally liable to taxation, he may apply to the Board of Supervisors, at their annual meeting, for an abatement of such assessment, and the said Board shall hear and determine the matter; but if said Board shall decide that any such property is not liable to taxation, and the question as to the liability of such property to taxation has not been previously settled, the decision of such Board shall not be final unless approved by the Auditor of Public Accounts, and it shall be the duty of the Clerk of said Board, in all such cases, to make out and forward to the Auditor a full and complete statement of all the facts in the case. If the Auditor is satisfied that such property is not legally liable to taxation, he shall notify the Clerk of his approval of the decision of the Board, and the said Clerk shall correct the assessment accordingly. But if the Auditor believes that the Board has erred in deciding that such property was not liable to taxation at the time of making the assessment, he shall advise the Clerk of his objections to the decision of the Board, and give notice to said Clerk that he will apply to the Supreme Court at the next term thereof, for an order to set aside and reverse the decision of the Board of Supervisors. Upon the receipt of such notice, the Clerk shall notify the person making application, thereof. And it shall be the duty of the Auditor to file in the Supreme Court a certified statement of the facts certified by the Clerk as aforesaid, together with his objections thereto, and the Court shall hear and determine the matter, as the right of the case may be." *Scates' Stat., vol.* 2, *page* 1057.

The objections made by the Auditor to the decision of the Board of Supervisors, and upon which he based his action in bringing the case before the Supreme Court of the State of Illinois, are as follows:

First—" Because the money invested in such shares is clearly within the meaning of the term "investment in stocks," as
[10] defined in Sec. 2 of said act of February 12, 1853, being an investment in the stock of an association, corporation, or joint stock company, the stock or capital of which is or may be divided into shares which are transferable by the owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by this act, the value of moneys so invested being required by Sec. 7, of the same act, to be listed and taxed the same as other personal property."

Second—" Because the rate of taxation sought to be levied on these shares is no greater than would be levied on the capital stock or shares in the case of Banks chartered under the laws of the State of Illinois, and therefore not in contravention of the provis-
[10] ions of Sec. 41, of the Act of Congress of June 3d, 1864, entitled 'An Act to provide a National Currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' (page 99, Statutes at large, 1863, 1864,) which declares 'That nothing in this Act shall be construed to prevent all of the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such Bank is located, and not elsewhere, but not at a greater rate than is assessed upon other nominal capital in the hands of individual citizens of such State; provided further, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this Act shall not exceed the rates imposed upon the shares in any of the Banks organized under the authority of the State where such association is located.' The law of Illinois taxes the whole capital stock in State Banks against the Banks themselves, thus including all the shares in one assessment against the Bank, instead of dividing the same into separate assessments against the several holders. This fully meets the requirements of the Act of Congress as to the rate of taxation. The assess-

ment of the whole capital stock in one amount, or the several shares of the same in the hands of different owners, is a question of form only, and does not vary the result as to the rate or amount of tax to be levied."

Third—" Because the taxation sought to be effected is not in
[*11*] contravention of any of the laws of Congress, excepting United States bonds from taxation under State authority. The property sought to be taxed is in no sense United States bonds, but is the value of the moneys invested in shares of the capital stock of the corporations or associations known as National Banks, being the property of individuals, and not the capital or assets of the banks themselves, which may be in part or in whole composed of United States bonds, but which is not sought to be reached by this assessment. The 'Capital Stock' of a bank or other corporation represents the amount of money paid or contributed by shareholders to its formation, its *assets* or *capital*, (not 'capital stock,') is the same money so received or property purchased therewith by the bank, together with such other money or property as the bank may have accumulated in addition to the original capital by business operations. The 'capital stock' is the property of individuals who subscribed and paid the same at the organization of the corporation or their assigns. The capital or assets is the property of the Bank itself. I deem the capital stock to be taxable property under the laws of this State."

At the January Term, A. D. 1866, of the Supreme Court of
[*13*] the State of Illinois, final judgment was rendered in said cause by said Supreme Court, reversing, annulling, and setting aside the order of the Board of Supervisors, and the cause now comes before this court upon writ of error for the purpose of reversing the judgment of the Supreme Court of the State of Illinois, reversing, annulling, and setting aside the order of the Board of Supervisors.

I.

We will first direct our attention to the question whether the assessment and taxation of the shares held by the stockholders of the Second National Bank of Peoria was authorized by any law of the State of Illinois.

In looking into the legislation of the State for this purpose, we find that by Sec. 10 of the law of 1851, creating a general system of Banking, the shares of Banks or associations organized under the law to be declared personal property and subject to taxation, and that the taxes thereon are to be levied upon, and paid by the bank, or incorporation itself, "and not upon the individual stockholders," the value of the property to be ascertained annually by the bank commissioners therein provided for, and the rate of taxation to be the same as that required to be levied on other taxable property by the revenue laws.

See Scates Stat., vol. 1, *page* 113.

Under the provisions of this section, no stockholder could be taxed upon the shares of stock held by him in any bank or association organized under the act, and while this fact may have no immediate bearing upon the present inquiry, it shows, what was at that time the general policy of the State in relation to the mode of taxing the property of Banks. It was to assess and levy upon the banking corporations themselves the proportion of the public burden which the capital and property of such institutions ought to bear, and not to distribute it on the stockholders individually, upon the shares which they might from time to time chance to own. There were important ends attained by adopting this course, and the Legislature had sufficiently good reasons to justify it. It was the most direct and simple, and consequently the least expensive.

The stock in these corporations might be, and doubtless was largely held by non-resident persons and corporations, not within the operation of the revenue laws of the State, and if the taxes were levied upon the shares in the hands of these holders, instead of upon the banks, so much of the revenue as ought to be paid by the property represented by these shares would have been lost to the State, and the burden of its citizens thereby proportionately increased. Whatever reasons operated to induce the State to adopt the mode of taxing the capital and property of banks upon the institutions themselves, in place of resting it upon the stockholders individually, the policy was a wise one, selected with care and deliberation by its Legislature, and we shall not expect to find that the State, in its future adjustment of its revenue laws, has departed from the general policy exhibited by this early legislation upon the subject.

In the second section of the act for the assessment of property and collection of taxes in counties adopting the township organization law, approved February 12th, 1853, *Scates' Stat., vol.* 1, *page* 1046, it is declared that the "*term 'investment in stocks,*' when used "in that act, should be held to mean and include all moneys invested "in the public stocks of this or any other State, or of the United "States, or in any association, corporation, joint-stock company or "otherwise,.... the stock or capital of which is or may be divided "into shares,.... *and for the taxation of which no special provision* "*is made by this act.*" If special provision be elsewhere made in the act for the taxation of the designated stocks, then, of course, the terms here defined do not have the meaning attached to them by this provision, in such a sense as to require the citizen holding such stocks to make return thereof in his list or statement of property for taxation.

By the seventh section of the same act, every property holder is required to make out and return a list or statement of his property for taxation, and to set forth therein, among other things, the "value "of moneys invested in bonds, stocks, joint-stock companies, or "otherwise, *which such person is required to list.*"

But the third section of this act specifies what property shall be exempted from taxation, and the ninth paragraph thereof provides that "no person shall be required to include in his statement, "as a part of his personal property, moneys, credits, *investments*, "in bonds, *stocks*, joint-stock companies or otherwise.....*any* "*shares or portion of the capital stock or property of the company* "*or corporation which is required to list or return its capital and* "*property for taxation in this State.*"

From the provisions of these three sections, it is indisputable that if elsewhere in the act special provision be made for taxing these stocks, otherwise than in the hands of the holder, or, if the capital and property of the bank is by law to be assessed to, and the taxes thereon paid by, the corporation itself, then the shares in the hands of the individual are expressly exempt from taxation, and the holder thereof need not and is not required to include the same in his annual statement of property for taxation, which, by the law he must make.

But we have already seen that in relation to all banks in the State organized under the general banking act of 1851, there is in that law express provision for taxing the capital stock of banks and property thereof to the corporations, and in addition thereto a denial of the right of authority to tax the shares in the hands of the holder.

It will in like manner be found, that *all* banks in the State, organized in virtue of any general or special law of the State, no matter which, by the revenue law of February 12th, 1853, above referred to, are required to list and return in the statement of their property for taxation the entire property of the bank, including the capital stock of the bank and other assets, making thereby special provision for the taxation of such property, otherwise than in the hands of the shareholder.

Section twenty of the revenue law last referred to directs and requires that the cashier of *every* bank, or banking company that

had been, or might thereafter be incorporated by the laws of the State, should make out and return to the *Bank Commissioners*, in the month of May annually, a written statement, containing the average amount of the notes or bills purchased or discounted during each month of the year, including at their value all choses in action or other assets on which the corporation has or was or is entitled to receive any "profit or other consideration in the shape of interest, "discount, exchange or otherwise," "stocks deposited with the "State Treasurer to be valued at the rate at which they were "deposited."

The Bank Commissioners, on receipt of such statement, were required to ascertain the amount of property, valued as required by the Act, and make return thereof to the Auditor of the State, who thereupon reported the same to the Clerk of the proper County, and the Clerk enters the assessment on the tax lists for taxation.

Section 21 directs that "to ascertain the amount of notes and "bills discounted and purchased, *and all other effects* or dues of "every description belonging to such bank or banking company, and "liable to taxation," there shall be taken the average amount for each month during the year, &c.

It is here seen that, in accordance with the general policy adopted with reference to these banking institutions, provision is made for assessing upon the corporation itself the entire property and effects of the bank, including, of course, its capital, be the same in money, in notes or bills discounted, or in the shape of bonds deposited with the Auditor. The mode of assessment is also *special* and *peculiar* to these associations, and differs much from the manner in which other descriptions of property in the hands of individuals are charged with their proportion of the public expense. In the one case the amount of the assessment is reached in a round-about-way, through the interposition of the bank commissioners, the Auditor of State and the County Clerk; in the other the valuation is arrived at directly

by the township assessor, from the statement received immediately from the individual.

The machinery thus provided by the Legislature of the State for the valuing of the property of banking associations, was found, in practice, to be inconvenient, cumbersome and expensive, and quite imperfect withal, for the provisions of the statute embrace those banks only which had corporate existence, in virtue of the laws of the State of Illinois.

In consequence of these defects and imperfections, the revenue law of February 12th, 1853, was subsequently amended, and the Act of the General Assembly approved February 14th, 1857, in the seventh section thereof, repeals sections twenty and twenty-one, which we have before referred to, and section sixth of the Act of 1857 is substituted in place thereof. This section reads as follows:

"The '*capital stock*' of *every bank* or *banking association*, paid "in or secured to be paid in, except so much thereof as is invested "in real estate, which shall be taxed as real estate as herein provided, "together with its surplus profits or reserved funds, and also the "real estate of every such company, shall be listed by the President "or Cashier thereof, and assessed and taxed in the same manner as "other personal and real estate of the county and town in which "such bank or banking association is located."

These provisions materially change and enlarge the revenue law as it previously existed, in relation to banks. Now, all banking associations in the State, under whatsoever law incorporated or organized, are within the purview of the provisions of this section, and if all banks within the State are not amenable to its requirements, it is because they are relieved therefrom by some provision of the Constitution of the United States, or an Act of Congress passed in pursuance thereof.

This section of the Act of 1857 confers the authority, and all the authority there is, in the legislation of the State, for the taxation

of the capital and other personal and the real property of banks and banking companies within the State. It contains clear, distinct and unequivocal provisions and directions to tax the entire capital stock and other property of the bank to the bank as its property, and likewise prescribes the mode in which the valuation for the tax shall be made. The President or Cashier of the corporation is required to include in his list the *capital stock* of the bank, the real estate, the surplus profits, and the reserved funds, and then the same and the whole thereof is to be assessed and taxed, in the same manner as other property in the town and county, where the bank is located; but not against the stockholders or individuals, nor as their property in whole or in part, but directly against the corporation itself and as its sole property.

The policy of taxing the capital and property of the bank as an entirety to the corporation itself, and thereby relieving the shares in the hands of the holder, thus early adopted by the Legislature of the State, and so steadily and perseveringly adhered to till the present time, is not only the most simple, direct and economical, as we have said, but is the more consistent and usual method of charging this kind of property with its proportionate burden for the support of the Government. It is taxing the property and effects of the institution to and in the hands of the legal owner thereof, and its capital stock especially, as one entire thing. The distributive shareholder is but the equitable owner of such undivided interest in the capital and property of the bank, as his certificate, issued to him by the bank, shows he is or may become entitled to. So direct, equitable and inexpensive is this course of levying the tax on this class of property, that it has been very generally adopted in other States of the Union.

But whether it is the better mode or the more general one, it is not, perhaps, very material to inquire, since it is *the one* and the *only* one prescribed or authorized by the legislature of the State, and if the property in question is to be taxed at all, it must be assessed to the corporation.

It will not do to take the ground, which the Auditor seems to intimate, and which must be assumed, if he be correct in his objections to the action of the Board of Supervisors, that the law of the State intends to tax the capital stock and property of the banks, and while it prescribes and directs that it shall be listed by and assessed against the corporation itself, yet, if this is not done and the tax be levied upon the shares in the hands of the holder, no wrong is thereby done to any one, since it is to be presumed that the same property is reached and taxed; the *form* or *mode* of its assessment is *immaterial*, and the error, if there be one in this respect, should be disregarded and the tax held to be valid.

Such position is not tenable. It assumes that without authority of law you may take from the citizen his property, and disregard property right, simply because it may seem to the officers of the revenue that the property in which he may happen to have an interest ought to be taxed. It can hardly be said to be a question of construction, for the reason that the statutes referred to, and which relate to the matter in hand, are too clear and unequivocal in their character to admit of any doubt as to what they mean, or what they order and require. If there were any doubt, the Auditor's view of the matter could not be sustained, without violating many and well established rules of construction.

These are statutes by which it is sought to take the property of the individual and appropriate it to the public use, and they must be strictly construed; upon this subject the rule is well settled. In the case of the United States vs. Wigglesworth, 2 Story's R. 369, Mr. Justice Story says: "The general rule in the interpreta-"tion of all statutes, levying taxes or duties upon subjects or citi-"zens, is not to extend their provisions beyond the clear import of "the language used, or to enlarge their operation so as to embrace "*matters not specifically pointed out*, although standing upon close "analogy." "In every case, therefore, of doubt, such statutes are "*construed most strongly against the government* and in *favor of* "*the subjects or citizens*, because burdens are not to be imposed nor

"presumed to be imposed, beyond what the statutes *expressly* and "*clearly import.* Revenue laws are in no just sense either reme- "dial laws or laws founded upon public policy, and therefore are "not to be liberally construed."

It is said in Wheeler vs. City of Chicago, 24 Ill. 107, a case involving the legality of a tax, "that a statute, under which the prop- "erty of the citizen is to be taken from him for the use of the "public, is to be strictly construed, and it must be complied with in "all its essential provisions." To the same effect, among others, are the following authorities.

Sewall vs. Jones, 9 *Pick.* 414.
Moseley vs. Tifft, 4 *Fla.* 402.
Dwarris, 743, 749.

The rule of strict construction applied to the statutes in question will not authorize the tax in dispute; indeed, a most free and liberal one would not. The Court, which should hold that a statute authorizing a tax upon the Second National Bank of Peoria, on the property owned by it, would justify the imposition of a tax upon one or more of the citizens of Peoria, merely because they may happen to have some equitable, undivided interest in some of the assets of the bank, would be obliged to resort to a most latitudinarian construction, one restrained by no rules or forms of law, and quite erratic in its character.

Another rule of construction applicable here, and equally well settled, is, that where a statute authorizes and provides for a thing to be done in a particular way, the coure prescribed *must be pursued* and the thing cannot otherwise be done. This point was expressly so ruled in the case of Commissioners of the Poor *vs.* Ganis, 3 Bevard 806.

The case of Rathbun vs. Acker, 18, Barb. 393, was to recover a tax assessed by the authorities of the village of Medina. When

the case came before the Supreme Court the principle here alluded to was deemed to be applicable, and Marvin J., in giving the opinion of the Court, says: "That statutes in derogation of the "common law, and by which authority is delegated to sell the "property of the citizen or to acquire the title thereto, are to be "strictly construed, and the authority is to be clearly shown and "*strictly pursued. It will not do to adopt a course not authorized* "*by the statute, upon the principle that it is equivalent to the require-* "*ment of the statute.*"

Other authorities are to the same effect.

Thurston vs. Prentice, 1 *Man. Mich.* 194.
Hale vs. Benton, Dudley, (*Geo.*,) 105.
Dewarris on St. 767.

By the statutes referred to, it is expressly provided that the capital and property of the banks in the State shall be listed by the cashiers or presidents thereof, that it shall be assessed to the corporation itself, and the taxes thereon paid by it. This statute is in derogation of the common law, and one by which the property of the citizen is taken and appropriated to the purposes of the government. The precise mode prescribed for the imposition of the tax must therefore be pursued. No equivalent can be substituted therefor, and any course other than the very one named in the statute would be illegal and wholly unauthorized.

From what we have said the conclusion is inevitable, that the shares of the capital stock of banks and banking associations in the State of Illinois, in the hands of the shareholder, are not subject to taxation, but are expressly and distinctly exempt therefrom, that there is no law justifying the imposition of such tax, nor is it possible so to construe the legislation of the State relating to the subject, as to create even a show of authority for such a proceeding.

The imposition of the slightest burden on the shares of the capital stock of banks organized under the laws of the State, is an

arbitrary proceeding for which there is no warrant, either in State or National legislation, and therefore the case is not, as the Auditor seems to suppose, within the scope of the proviso to section forty-one of the act of Congress approved June 3d, 1864, entitled "An act to provide a National Currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." Whether the capital stock of the bank in question, or the shares thereof in the hands of the holder, under appropriate State legislation for that purpose, would be subject to the revenue laws of the State to any extent, and if so, how far, we shall consider later in this discussion: our present purpose is to enquire how this proviso affects the question presented by this record, and now under discussion.

It is very clear that the proviso itself does not, nor does it purport, on behalf of the State, to impose a tax on the shares of these National Banks, and if it did it would be valueless and void, for the reason that the imposition of such a tax belongs alone to the sovereign power of the State. It does assume, however, that it was within the power of Congress to legislate upon this subject, and to prohibit the imposition of any such tax by the State, if deemed advisable.

In the exercise of this power, which the Auditor's objection implies to exist, Congress did provide, not that it may be exercised by the States, but that if it is exercised, and any tax be imposed on shares of National Banks in the hands of the holder, *the rate* of "such taxation *shall not exceed the rate imposed upon the shares* "*of any of the banks* organized under the authority of the State "where such association is located." We have before shown that on the *shares* of banks organized under the law of the State, there is *no rate* of taxation; but they are not only not taxed, but by express provisions of the statute, are exempt from all taxes and from all *rates* of taxation; and since the proviso declares that the *shares* in National Associations shall not be subject to a greater rate than *shares* in State banks, it follows that no taxes whatever could

be imposed on the shares in the Second National Bank of Peoria, at any, no matter how low, a rate. There is in the proviso under the circumstances presented by this record, a prohibition to the imposition of the tax in question.

It is said, to be sure, by the Auditor, that the entire capital, which includes all the shares, is taxed as a whole, and that this, so far as the rate is concerned, is equivalent to taxing the shares. But the answer to this is, that under the authority to which we have referred, this class of statutes is to be strictly construed, the mode of taxation designated must be scrupulously adhered to, and for it there is and can be no substitute or equivalent. These rules relate as well to the statute authorizing and regulating the objects and rate of taxation as to the machinery and manner of its imposition.

And again, a tax levied upon the entire capital of a bank, which includes all the shares, is not the same thing or equivalent to a tax levied upon the shares in the hands of the stockholders. "The Corporation," says Mr. Justice Nelson in the case of

Van Allen vs. the Assessors, 3 *Wallace*, 584,

"is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purpose for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations." A striking exemplification may be seen in the case of the

Queen vs. Armond, (9 *Adolphus & Ellis, new series*, 806.)

The question related to the registry of a ship owned by a corporation. Lord Denmore observed:

"It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation

are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution and termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him; now, it is this interest which the Act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it."

This doctrine is clearly opposed to the ruling of the Supreme Court of the State of Illinois, in this suit, which proceeds upon the ground that a tax upon the shares is the same thing as a tax upon the capital stock of the bank. The Supreme Court of the State of Illinois say—"The original law required the shares to be taxed to the several shareholders, and the amendment requires all the capital stock to be assessed and taxed to the corporation. Under the original law the shares representing the capital stock, when assessed, produces precisely the same result as when the capital stock is taxed. The amount assessed by either mode is precisely the same. The shares represent the capital stock, and the capital stock represents the shares. If listed by the shareholder, he would pay the tax directly, and if listed by the bank he would pay the same amount indirectly. It only accomplishes the same end by a different mode. It is, in either case, a tax on the shares of the capital stock, and at the same rate."

This being the ground, and the only ground, upon which the Supreme Court of the State of Illinois bases its opinion, and it being directly opposed to the opinion of Mr. Justice Nelson above quoted,

cannot be allowed to prevail. The opinion of Mr. Justice Nelson upon this point, it seems to us, is conclusive of this case, and must reverse the decision of the Supreme Court of the State of Illinois.

Having reached the conclusion, that there is neither act of Congress nor law of the State to authorize or justify the imposition of the tax on the shares in the bank in question, in the hands of the plaintiffs in error, and that the action of the Board of Supervisors was therefore correct, the judgment of the Supreme Court of the State of Illinois, must be reversed.

The recent decisions of this Court in the several cases lately brought before it, in which the same questions have been raised and decided as are involved in this case, render it unnecessary for us to present for the consideration of this Court the further questions which would seem to be involved in this case, as they have all been passed upon by this Court, and fully decided in the several cases above referred to. But as we had prepared this argument, and discussed those questions before the decisions last above referred to were rendered, we trust this fact will be a sufficient apology for the insertion of the following considerations:

II.

We are now to inquire whether this tax can be maintained, even upon the supposition that at the time it was levied there were in the statutes of Illinois laws purporting to authorize the taxation of the shares in the hands of the holder, of the capital stock of banks and banking associations in the State, including those organized under the Act of Congress for the formation of National Banks.

The discussion of this question involves many and grave considerations, which affect not only the parties to this controversy,

and other persons in like manner interested in National Banks, but also the exercise of the sovereign powers of the respective State and National governments.

It becomes material to determine to some extent what are the powers of the Federal Government, and how far it may control the instruments and resources necessary to its maintenance, without interfering with the reserved powers of the States, or being interfered with by the latter. If it be true, as has at some time been claimed, that the means and instruments by which the general government is maintained and its operations carried on, are under the control of the State authority; if it be open to the States to load with taxation, or otherwise render unavailable those means and resources, and especially those affecting its credit, and to which alone in great crises and times of public danger it can resort, then, indeed, is the Republic unsafe, and we have no warrant for the perpetuity of our liberties.

That the Constitution does confer upon the National Government all power requisite to its own maintenance could not well be denied, and at the time of its adoption it was made a ground of objection, that in the matters of revenue and other things affecting its credit, the general government was left unrestrained, and in no manner within the control of the States, in the exercise and command of the means and resources necessary to its defence and maintenance.

In replying to this objection, Alexander Hamilton says: "I feel a thorough conviction that power of having recourse to these means ought to exist in the Federal Government, and that it be unrestrained in its exercise. There are certain emergencies of nations in which expedients, that in the ordinary state of things ought to be forebone, become essential to the public weal, and the government, from the possibility of such emergencies, ought to have the option to make use of them. There may exist certain critical and tempestuous conjunctures of the State, when the unlimited command and

unrestrained control of these resources become inestimable and indispensable. And as I know nothing to exempt this portion of the globe from the common calamities that have befallen other parts of it, I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon which, in any possible contingency, might be usefully employed for the general defence and security."

The fathers of the Republic and the framers of the Constitution seem to have taken great care and exercised a wise precaution in the adjustment of power between the State and National Governments, to leave with the former no authority, by imposition upon the means and resources of the latter, to impair or destroy its credit, at all times essential to the general welfare, and in times of great peril indispensably necessary to the public defense.

So important is it that the Federal Government should retain the free and unrestricted exercise of those powers and rights possessed by it, and that it should not be left to the States in any manner to interfere with them, that the Hon. the Secretary of the Treasury, in his recent report to Congress, deemed it necessary to caution Congress against any legislation which should authorize the taxation of the government securities by the local authorities of the States, and thereby impair the public credit, and upon this subject he says:

"In view of the fact that the exemption of government securities from State taxation is, by many persons, considered an unjust discrimination in their favor, efforts may be made to induce Congress to legislate upon the subject of their taxation. Of course the existing exemption from state and municipal taxation of bonds and securities, now outstanding, will be scrupulously regarded. The exemption is a part of the contract under which the securities have been issued and the money loaned thereon to the government, and it would not only be unconstitutional, but a breach of the public faith of the nation, to disregard it. It would also, in the judgment

of the Secretary, be unwise for Congress to grant to the States the power which they will not possess, unless conferred by express congressional enactment, of imposing local taxes upon securities of the United States which may be hereafter issued. Such taxation, in any form, would result in serious, if not fatal, embarrassment to the government, and, instead of relieving, would eventually injure the great mass of the people, who are to bear their full proportion of the burden of public debt. This is a subject in relation to which there should be no difference of opinion. Every tax-payer is personally interested in having the public debt placed at home, and at a low rate of interest, which cannot be done if the public securities are to be subject to a local taxation. Taxes vary largely in different States, and in different counties and cities of the same State, and are every where so high that, unless protected against them, the bonds into which the present debt must be funded cannot be distributed among the people, except in some favored localities, unless they bear a rate of interest so high as to make the debt severely oppressive, and to render the prospect of its extinguishment well-nigh hopeless. Exempted from local taxation, the debt can, it is expected, be funded at an early day at five per cent.; if local taxation is allowed, no considerable portion of the debt, which falls due within the next four years, can be funded at home at less than eight per cent. The tax-payers of the United States cannot afford to have their burdens thus increased. It is also evident that the relief which local tax payers would obtain from government taxation, as the result of a low rate of interest on the national securities, would, at least, be as great as the increase of local taxes to which they would be subjected on account of the exemption of government securities; while if those securities should bear a rate of interest sufficient to secure their sale when subject to local taxes, few, if any, of them would long remain where those taxes could reach them. They would be rapidly transferred to other countries, into the hands of foreign capitalists, and thus at last the burden of paying a high rate of interests would be left upon the people of this country without compensation or alleviation."

But while it is clear that the States do not and ought not to possess the power of imposing burdens upon these securities, and that this ought to be apparent to every one, yet it is but matter of common observation, that many of the public journals of the country, and officers chosen to watch over and guard the public credit, are advocating the local taxation of these bonds. What is still more surprising, while wise statesmanship, and the general welfare and the public safety would seem to demand and declare the law to be otherwise, we find an eminent judge giving the opinion of the court of last resort, in a neighboring State, holding that these government bonds are by an indirect method subject to local taxation under State authority. Such surely ought not to be, and is not, the law. Fortunately for us, the question is not a new one in the judicial history of the country.

Long before the act of Feb. 25, 1862, and the issue of the government bonds now outstanding, and as early as the case of *Weston v. The City Council of Charleston*, 2 *Pet.* 449, a cause came before the Supreme Court by writ of error, which refers to the matter. By an ordinance of the City of Charleston, which was passed in virtue of a law of the legislature of the State, and therefore to be regarded as a law of the State, "Stock of the United States" was, among other things, made taxable. The plaintiffs, as owners of such bonds or stocks, applied to the Court of Common pleas for the Charleston district for a prohibition to restrain the city council from taxing the stock, on the ground that the tax would be inconsistent with the constitution and the laws of the U. S., and laws passed in pursuance thereof. The prohibition was granted; but upon the hearing, the district court was of the opinion that the tax was valid, and they reversed the order for a prohibition, and therefore the writ of error was brought. The opinion in the case was delivered by that eminent jurist, Chief Justice Marshall, than whom one of greater learning in the law, and of more enlarged and statesmanlike views, American jurisprudence cannot boast. The opinion covers the whole subject, and left nothing to be added by those who should subsequently be called to re-examine the question involved. The propositions are

so clearly and concisely stated and discussed, and the conclusions reached by a power of logic so irresistible, that we feel at liberty to make somewhat extended references to it.

The Conrt say, the main question is, are the stocks issued for loans made to the Goverument of the United States liable to be taxed by States and corporations?

"Congress has power *to borrow money on the credit of the United States.* The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract while subsisting and in full force. The power operates upon the contract the instant it is framed, and must apply a right to affect that contract. If the States and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can goverment adopt, which will not be exposed to its influence?"

"But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies and the urgent demands of the moment. The people, for objects the most important that can occur to the progress of nations, have empowered their government to make these anticipations, 'to borrow money on the credit of the United States.' Can anything be more dangerous or injurious than the admission of a principle which authorizes every State and corporation in the Union

which possesses the right of taxation to burden the exercise of this power at their discretion?"

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods, for the most important purposes, on the free exercise of which the interests, certainly, perhaps the liberty, of the whole depend, may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy."

"In a society formed like ours, with one supreme government for national purposes, and numerous State governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operations. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and most difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to individuals. In the performance of it we have considered it as a necessary consequence of the supremacy of the government of the whole, that its action, in the exercise of its legitimate power, should be free and unembarrassed by any conflicting powers in the possession of its parts: that the powers of a State cannot be rightfully so exercised as to impede and obstruct the free course of those measures which the government of the United States might rightfully adopt."

"The subjects over which the sovereign power of a State extends are subjects of taxation by the State; but those over which it does not extend, are, upon the soundest principles, exempt therefrom."

"A contract made by the government in the exercise of its power to borrow money on the credit of the United States, *is undoubtedly independent of the will of any State* in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, to be exempt from State taxation."

"It is admitted that the power of the government to borrow money cannot be directly opposed; that a law prohibiting loans to the United States would be void; but it is claimed that a tax on them to any amount is allowable."

"It is impossible, we think, not to see the intimate connection between these two modes of acting upon the subject. It is not the want of original power in an independent sovereign State to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by the constitution. The American people have conferred the power to borrow money upon their government, and by making that government supreme have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with the restraining or controlling power, and *the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.*"

"The tax on the government stocks is by this court thought to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently repugnant to the constitution and void."

This is, perhaps, the earliest case directly upon the power of the State to tax the bonds or public stocks of the United States, but the principles upon which the decision proceeds had before that time been carefully discussed and considered by the same court, and, in a learned and most elaborate opinion by the same great judge, thor-

oughly and well settled. I refer, of course, to the celebrated case of *McCullough vs. The State of Maryland*, reported in the 4 Whea. 316.

This case arose from the fact that the State of Maryland, by an act of its legislature, had levied a tax upon a branch of the Bank of the United States, situated in that State.

The first question presented by the case and determined was, that the act of Congress incorporating the Bank of the United States, was a law made in pursuance of the constitution, and therefore constitutional and valid. The argument by which this conclusion was reached was, that the creation of the bank was but a means justifiable and necessary to the government to carry out the powers expressly granted to it: such as to levy and collect taxes, to borrow money, to carry on war, and raise and support armies and navies.

One other question presented by the case, and the one especially pertinent to the present inquiry, was, whether the Bank of the United States, or its Maryland Branch, which it had authority to establish, constituting, as it did, the means selected by the government for carrying on its affairs, and executing the express powers entrusted to it by the constitution, was subject to be taxed in its operations by the State of Maryland?

In determining this proposition, the Court, among other things, say: "The people of a State give to this government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limit to the exercise of this right; resting confidently on the interest of the legislator, and on the influence of the constituents over the representative to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of the State to tax them sustained by the same theory. These means are not given by the people of a particular State, nor given by the constituents of the legislature, which claims the right to tax

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One other question presented by the case, and the one especially pertinent to the present inquiry, was, whether the Bank of the United States, or its Maryland Branch, which it had authority to establish, constituting, as it did, the means selected by the government for carrying on its affairs, and executing the express powers entrusted to it by the constitution, was subject to be taxed in its operations by the State of Maryland?

In determining this proposition, the Court, among other things, say: "The people of a State give to this government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limit to the exercise of this right; resting confidently on the interest of the legislator, and on the influence of the constituents over the representative to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of the State to tax them sustained by the same theory. These means are not given by the people of a particular State, nor given by the constituents of the legislature, which claims the right to tax

them, but *by the people of all the States. They are given by all for the benefit of all, and upon theory should be subjected to that government only which belongs to all.*"

"It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction."

"This is true. But to what source do we trace this right? It is obvious that it is an instrument of sovereignty, and is co-extensive with that to which it is an incident. *All subjects over which the sovereign power of the State extends, are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation.* This proposition may almost be pronounced self-evident."

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission, *but does it extend to those means which are employed by Congress* to carry into execution *powers conferred* on that body by the *people of the United States?* We think it is demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them."

"If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have the principle which leaves the power of taxing the people and property of a State unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach all those *powers which are conferred by the people of the United States on the government of the Union, and those means*

which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union. We are relieved from clashing sovereignty, from interfering powers, from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are driven to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power? The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

And the Court say, "We find, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. *The right never existed, and the question whether it has been surrendered cannot arise.*"

"The power to tax involves the power to destroy, and the power to destroy may defeat and render useless the power to create, are propositions that cannot be denied."

"If a State, therefore, may tax one instrument employed by the government in the execution of its powers, and thereby destroy it, they may in like manner tax and destroy every other instrument. They may tax the mail, the mint, patent rights, the papers in the Custom House; judicial process; they may tax all the means employed by the government to an excess, which would defeat all the ends of the government. This was not intended by the American people. They did not design to make their government dependent on the States."

"A reference to these cases shows that thus early the doctrine was immovably settled, that the States had no power to impose taxes on the means employed by the government in the exercise of its powers; that the people of a State possessed and therefore could confer no such power on their State Government, and that to tax

the public stocks or bonds of the government was to impose a tax on one of the means, and a most vital and indispensable one, which the government has and must employ, for it is a tax upon the exercise of the power to borrow money on the credit of the United States."

The doctrine of these cases was subsequently recognized and approved in the cases :

Osborn vs. the United States Bank, 9 *Whea.* 859.
Brown vs. State of Maryland, 12 *Whea.* 457.
Dobbins vs. Commissioners of Erie Co., 16 *Pet.* 449.
American Law Register for March, 1865, *page* 277,
State of New York vs. Commissioners.

For a quarter of a century and more, the decisions in the above cases remained unquestioned, and were thought to have correctly defined and adjusted the respective rights of the State and Federal Sovereignties in this regard. But recently, and in the case of the *Bank of Commerce vs. New York City*, 2 *Black* 620, the question of the power of the States to tax United States bonds came again before the Supreme Court.

Mr. Justice Nelson delivers the opinion of the Court, and states the question involved to be, whether or not the bonds of the United States, constituting a part or the whole of the capital stock of a bank organized under the laws of New York, were subject to State taxation. The capital of the bank, under the laws of the State, was taxed upon a valuation, like the property of an individual. The Court say that these stocks were held by the Bank the same as such stocks are held by individuals, and were alike subject to taxation or exemption under State authority, so that the question presented was precisely the one adjudicated in the case of *Weston vs. the City of Charleston*, and the Court, adopting a similar course of argument, arrives at the same conclusion, and holds that the bonds held by the bank, and which constituted the greater part of its capital, were not subject to taxation under the laws of the State of New York.

The Court, in the course of their opinion, use this language: "The conclusive answer to the attempted exercise of State authority in all these cases is, that the exercise is in derogation of the power granted to the General Government, within which it is supreme. The government which is subject to the control of another distinct government cannot be sovereign or supreme, but is subordinate and inferior to the other. Its functions and means essential to its administration, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means, if another government may tax it at discretion? It is apparent that the power, function or means, however important and vital, are at the mercy of that government. For it must be remembered, if the right to tax exists at all, it is a right which, in its nature, acknowledges no limits."

In the Bank Tax Case, in the 2 Wallace, 200, the Court affirm the opinion pronounced in the last case, and also hold that a tax, laid by a State on banks, on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, is a tax on the property of the institution, and that when that property consists of stocks of the Federal Government, the law imposing the tax is void.

These references cover the cases which have come before the Supreme Court, involving the question under examination. The decisions are uniform and are all based upon the same general reasoning. They proceed upon a want of power in the States, and are in no instance based upon any Act of Congress prohibiting such action on the part of the States. The rule and principle of these decisions apply alike to all the stocks of the government, under whatever law issued, or wherever or by whomsoever held. There is no exception. Nor do these bonds, in fact, depend at all for their

exemption from taxation upon any law of Congress, in terms withdrawing them from the operation of the revenue laws of the State. It is true that Congress, in the second section of the Act of 25th of February, 1862, provides, "That all stocks, bonds, and other securities of the United States held by individuals, corporations or associations within the United States, shall be exempt from taxation by or under State authority." This provision applies, in its terms, to all bonds, as well those issued before as after the passage of the Act, but it must not be supposed that prior to the passage of this Act these public securities were subject to be taxed by the States. Every case to which we have referred is authority to the contrary. In truth, this provision in no manner affected the character of these bonds in this regard. It was a mere declaratory statute, which it was well enough for Congress to pass, since it carries the information to the general public of what is now and what has always been the situation of these securities in reference to local taxation. But if they were not exempt from State taxation before and without this provision, it would not be in the power of Congress, by this Act, to make them so. We shall again have occasion to call the attention of the Court to this point. We have referred to it here simply to show that Congress, in passing this declaratory statute, simply reaffirms that by the powers and provisions of the Constitution itself, these public securities are not subject to local taxation.

From the reference we have made to the recommendations of the Secretary for the action of Congress, and to the numerous decisions of the Supreme Court, whose opinions are final and authoritative, it will be seen that each department of the Government is of opinion, and in like manner holds and declares, that the bonds of the United States are not subject to local taxation by the States.

It will be observed from the record in this case, that the entire capital stock, undivided profits and surplus funds of the Second National Bank were invested in United States Bonds at the time the tax in question was levied, on the 1st day of May last; these

constituted all its property. If the tax in question had been levied upon these bonds, *eo nomine*, or upon a valuation of the same in any manner or at any rate, it would come within the rule of the decision of the Bank Case in 2 Wallace, and would have been invalid. This was not done directly, but the shares of the capital stock of the Bank which were thus invested are made the means of reaching the property taxed.

This brings us to consider whether this is not, also, by indirection, a tax upon the bonds in question. The tax imposed in the case last referred to was upon a *valuation equal to the amount of capital paid in or secured to be paid in.* Now, what was done in the present case? The tax was upon the shares of the respective holders at their *par value*, as appears by the record. Here, then, was a *valuation*, and, as each share was assessed, the whole amount, of the *valuation was exactly equal to the capital stock paid in.* But of what was the *valuation?* Why, of the shares, of course; but of the shares of what? A share must be a share of something, or the term is senseless, and means nothing of value. They were the shares of the capital stock. What was valued, then, was certain parts or shares of the capital stock, which the respective shareholders owned. But this entire capital stock was in bonds; so that what was, in fact, valued, was the several parts, which constituted the whole of the bonds of this bank, into which it had put all its capital. The capital stock, therefore, which was in bonds, was assessed at a valuation equal to the amount thereof, and the case does not differ in principle, in the least, from the 2d Wallace Case. The only distinction to be made in the two cases is, that in the one case the assessment was made against the bank, and in the other it was against the real owners. The same property, by a similar valuation, was taxed in both cases.

In the case of the *Bank of Commerce vs. New York City*, the capital stock was mostly invested in Government bonds; it was taxed at a valuation like the property of the individual. In that case, the whole capital stock, or, what is the same thing, all the

shares of the capital stock, were valued together and taxed to the bank. The court held, that because that capital was invested in United States securities, the tax could not be supported.

In the present case, all the shares of the capital stock are valued in the hands of the owners thereof, and since each of these parts of the capital stock and the whole thereof were invested in these Government securities, this Court must hold, as did the Court in the Bank of Commerce case, and for the same reasons, that it is a tax upon Government bonds, and is, therefore, invalid.

It will be admitted that if this tax had been assessed directly against the bank and upon its capital thus invested, it could not be maintained. Now, suppose the bank owned all the shares itself, and the tax was assessed upon the capital stock in its imaginary division into shares, would it make the slightest difference? The identical property would be taxed in both cases, and in both alike the tax would be in violation of law. Now, instead of the bank holding all these shares, suppose it and one or more individuals held them, would it make any difference as to what property was, in fact, valued and taxed?

But we say that in all cases it is the capital stock, surplus funds and undivided profits, if there be any, that are taxed; and if these are, as in the present case, all invested in Government bonds, then it is a tax on these bonds; whether taxed as a whole or in undivided parts can make no difference; in both cases there is but one identical property to be taxed, and whichever course be pursued, the same property is reached. In the one case, it is taxed to the bank, which is, technically, the legal owner, and in the other it is assessed to the equitable and real owner. In either case, take away the bonds, and there is no longer property susceptible of valuation or taxation. There is no capital, for it has been taken away. There are no shares of value, for there is no longer property or capital, answering to the calls of the shares.

The truth is, that the corporators or shareholders are the *real owners;* they own the entire property of the bank, and the fact that they choose to adopt a name in which the property shall stand, or because they create an artificial being to act for them as a mere naked trustee, in holding the legal title, makes them none the less the real owners of the bonds or property of the bank.

To tax the shares of the bank is, therefore, to tax the bonds and property held by the bank. So certain is this, that the mode of taxing them can hardly be said to be indirect. The bonds and property of the bank in question are as directly, and even more directly, reached through the shareholder, the real owner, as they would be through this artificial being, the mere trustee.

We feel the more confidence in these positions for the reason that a case like the present, in all that is material, has been recently determined by the Supreme Court of Indiana. We refer to the case of *Whitney vs. The City of Madison*, 23 *Ind.* 331. In that case, the capital of the bank and the surplus accumulations were invested in government bonds, at the time the tax was levied. The plaintiff owned $16,000 in the shares of the bank, which were assessed and taxed under the laws of Indiana. The question there, as here, was as to the validity of the tax, owing to the fact that the capital and surplus funds of the bank were invested in the government securities. The Court refer to and examine to some extent the cases decided by the Supreme Court, to which we have made reference in this argument, and especially the cases in *Wallace & Black's Reports*, and concluded that these cases cover and determine the question involved, and accordingly decided the tax to be illegal.

In their opinion, the Court say, that there are in Indiana two modes of taxing the *capital stock:* one by assessment against the corporation itself, the other to separately list and assess the stockholders "*on the amount of the capital stock which they may own in the corporation.*" In this language the Court hold that the same

thing is accomplished by each of these methods, and that the one was as much a taxing of the capital stock as the other.

Again, the Court say, that under the constitutional provision requiring all property to be assessed at its value, the actual value of such stock must in all cases be the criterion for taxation. It follows, the Court say, that a tax assessed on the capital stock of a corporation is a tax on the property of which such capital is composed.

This case therefore determines the whole question. It decides that to tax the shares is to tax the capital stock, and to tax the capital stock is to tax the property of which such capital is composed, and as in that case and the present one the property composing the capital stock was in government bonds, the taxes in both cases are alike illegal and void.

There really is no doubt about the point, and further discussion of it is unnecessary. Indeed, so much as has been said would have been inexcusable, were it not for recent decisions in the New York Courts, calculated to raise a doubt upon the subject.

In the case of *The City of Utica vs. Churchill et al.*, especially referred to, the opinion, I think, was delivered by Denio, Justice, and upon this point it is said, and the whole argument is based on his, "That the shareholder is *not the owner* of the *stock* possessed by the corporation. He is only entitled to participate in the net profits, and on a dissolution, has his *proportion of the capital and property*, after debts are paid."

That the premises here assumed are untenable, I think, can admit of no doubt. Mr. Angell says, corporations are of two sorts, sole and aggregate: the one is composed of a single individual, and the other of two or more. In the case of a corporation sole, the entire stock is owned by a single individual, and a certificate, if he

had one from the corporation, would so represent it to him. Now if the property of this bank does not belong to him, to whom does it belong? Not another individual in existence has an interest in it, and it either belongs to him or it is without ownership. He may not have the mere naked legal title to it, but to say he would not own every property interest therein, is opposed to argument and common sense.

Now, instead of a sole corporation, take one composed of say four individuals, and the result is precisely the same. The certificates that these persons would respectively hold, would certify to them that they owned one-fourth of the entire property which might from time to time stand in the name of the bank.

It is said the shareholder is only entitled to participate in the net profits, and on dissolution have his proportion of capital and profits. That the shareholder is entitled to these is very clear, but what does it prove? Not that he is not the owner. On the contrary, it shows with great certainty that he is the owner of the proportion of property represented by his certificate, else why or how would he be entitled to *net profits* and a *pro rata* of the property of the bank?

Suppose all the net profits, together with the capital stock, be invested in government bonds, and a dissolution takes place: what would each shareholder get? Most clearly he would get such a proportion of government bonds as his shares bore to the whole number of shares, and he would get them simply because he would be the owner of them.

But the fact of dissolution cannot affect the property-rights of the shareholder. They would be as great, and exactly the same, before dissolution as after. The interest would be in no manner changed.

The distinction, sought to be based upon the ownership of the mere naked legal title, has never been regarded in the matter of taxation. The laws have in most cases been so framed as to reach the real and beneficial owner. Such certainly ought to be their character, so far as may be. Nor in the law can any such distinction be maintained. It proves too much. It would subject *National banks* to be taxed on their capital, or on a valuation unequal to their capital, notwithstanding it be invested in government bonds. For it will be observed that by the provision of Sec. 19 of the act of Congress of June 3d, 1864, the Treasurer of the United States holds the legal title to all the bonds required to be deposited by the banks for the security of their circulation. The interest which the bank holds in these bonds is what Denio J. says is the interest of the shareholder, to wit: to receive the profits (the interest), and on dissolution and redemption of the circulation, the bonds. And yet, notwithstanding all this, the Supreme Court, in the cases referred to, have three times held that the banks could not be taxed on these bonds, nor upon a valuation of them.

The error of the learned judge seems to have arisen from confounding the *certificates* of stock, with the shares or parts of the capital,—the evidence with the property,—the shadow with the substance. This is apparent, for Denio J. speaks of stock as being something like a chose in action.

The *certificate* of stock, which in common speech is sometimes called "stock," is not of value. It is a mere piece of paper, and is neither property nor does it purport to be property. It is a certificate, however, that the holder has property, *not in that certificate*, but in the capital stock and property of the Company issuing it, and that he is the owner of such *pro rata* share as is in the certificate mentioned.

A reason assigned by the New York Court for its view of this matter is, that the capital and property of a bank is often changing, and any other course would leave property owned by the bank, not invested in government stocks, free from taxation.

How this fact, if true, would prove or tend to prove that the holder of a *share in a certain capital does not own such share*, I am not able to understand; nor does it establish any such proposition. As might be expected, we find a false reason for an untenable position.

If it be true, as it undoubtedly is, that the taxation of the shares of the capital of the bank is a taxation of the bonds so far as such capital is thus invested, this fact does not authorize a Court to hold otherwise, merely because it has the effect to release other property of the bank from the payment of taxes. The fact that the portion of capital invested in government bonds is relieved from local taxation, results from a provision of the Constitution of the United States, and a law of Congress in pursuance thereof, which are supreme.

Now, if it should follow from this that certain other property of the bank was thereby *ex necessitate* exempt from taxation, the Courts could neither repeal the Act of Congress nor abrogate the provisions of the Constitution. They would be obliged to hold that *such other property*, as a *necessary consequence*, was in like manner released, in virtue of such provision of the Constitution. They could not assume to disregard a provision of the Constitution, and do a thing conceded to be unlawful, in order to accomplish that which in the absence of such provision might be legitimate and proper.

But no such consequences do in truth follow from the fact that to tax the shares is to tax the capital, and the bonds in which the same is invested.

Nothing would be more easy than for a State legislature to provide that on the first day of May in each year it should be ascertained what part of the capital and property of a bank was invested in government securities, and what otherwise, and the

manner of reaching this information, and then to enact that the shares of the capital stock of such bank should be assessed in such *pro-rata* amount as the capital invested otherwise than in government securities might bear to the whole capital of the bank. One would not be obliged to go beyond the 41st Sec. of the National Bank Act of June 3d, 1864, for a substantial precedent for this method of taxation.

But enough has been said to show that the opinion of the New York Court is supported neither by reason nor authority. Until the time when it shall be deemed the business of the Courts to refine upon the laws, and to find out, if possible, how to avoid their requirements, rather than by an enlarged and statesmanlike view to ascertain their real meaning and enforce their provisions, we shall not be likely to fall in with the reasoning or conclusions of the New York cases. We shall rather be content with the law upon this subject, as adjucated in the case of *Whitney vs. the City of Madison*, and especially so since the opinion given in that case accords so well with the long line of decisions in the Federal Courts.

Thus far in the conduct of this argument we have made little reference to the National Bank Act of June 3d, 1864, which repealed the former one of Feb. 25, 1863, and now authorizes and controls the existence and operations of National Banks. It was not necessary to do so, for the provisions of that act do not and cannot materially affect the points in controversy, and when we say this, we are not forgetful that they constitute one of the grounds of the Auditor's objections.

All there is in that act relating to the subject of taxation is found in the forty-first section.

In that section it is provided, among other things, that "In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half year, upon the average amount

of its notes in circulation, and a duty of one-quarter of one per centum each half year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half year on the average amount of its capital stock, *beyond the amount invested in United States bonds.*"

Now, what is to be understood by the term, "*in lieu of all existing taxes*," as used in this section? We have seen that by the case of *McCullough vs. The State of Maryland*, the old Bank of the United States, because it was an instrument and an agency of the government, necessary to its operation, was not subject to taxation under the laws of the State. The present national banks are within the rule of that decision, as they are in like manner agencies created for the purpose of carrying on the operations of the Federal Government. And the rule was held to apply to them in the case of *The City of Utica vs. Churchill*, before referred to. These institutions as such are then exempted from local taxation, not in virtue of the above provision, but *by the Constitution* and *the act giving them existence.*

The government bonds owned by the bank, including those in which its capital is invested, in no manner depend on this *express provision* for exemption, for we have shown, by the many cases cited, that they are exempt under the provisions of the Constitution, for the reason that they are a *necessary means* to enable the government "to borrow money on the credit of the United States."

But in reference to the "deposits," and other property mentioned in the provision quoted, since they do not come within the reason of the rule in the cases referred to, and they certainly do not, unless they are absolutely necessary and indispensable to the maintenance of those institutions, which can hardly be said, they will fall within the general mass of property subject to taxation by the State, and over which the power of the State, in reference to taxation, becomes sovereign, and cannot be interfered with by the General Government.

State Treasurer vs. Wright, 28 *Ill.* 509.

And the provision, therefore, if it can have a different meaning, ought not to be construed as designed to interfere with this State Sovereignty, or as intended to withdraw this portion of the property of the bank from local taxation in the State. The phrase, then, "*in lieu of all existing taxes*," must have reference to taxes imposed by the General Government, and does not, and was not designed to alter the law as it stood before in reference to the liability of the property of these banks to be taxed by local or State authority.

The discussion of this point was not perhaps necessary to our purpose, but we have noticed it here, as it may have some bearing upon the question we are next to examine, involving the effect of the proviso contained in this forty-first section.

This proviso is as follows:

"*Provided, That nothing in this act* shall be construed to pre- "vent all the shares of any of the associations, held by any person "or body corporate, from being included in the valuation of the per- "sonal property of such person or corporation, in the assessment of "taxes imposed by or under State authority, at the place where such "bank is located, and not elsewhere, *but not at a greater rate than* "*is assessed upon other moneyed capital in the hands of individual* "*citizens of such State.*"

"*Provided further*, That the tax so imposed under the laws of "any State upon the shares of any of the associations authorized by "this act, shall not exceed the rate imposed upon the shares in any "of the banks organized under authority of the State where such "association is located."

"*Provided also*, That nothing in this act shall exempt the real "estate of associations from either state, county or municipal taxes, "to the same extent, according to its value, as other real estate is "taxed."

The object of this proviso, or saving clause, when taken in connection with the other provisions of this act, it seems to us is very apparent. It will be remembered that this act (Sec. 28,) provides that for certain purposes, and under certain circumstances, such associations may purchase and hold real estate.

"That any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a national association under its provisions." * * * "And any state bank, which is a stockholder in any other bank by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under, and have accepted the provisions of this act." (Sec. 44.)

And furthermore, that it is only required by this act, that one-third of the capital stock of associations formed under the same, shall consist of United States bonds, the remainder, or two-thirds of the whole capital may be invested in the stocks of other corporations, real estate, or other property not expressly prohibited by the act.

These several provisions, when taken in connection with the language made use of in the forty-first section, that *in lieu of all existing taxes*, every association shall pay certain duties to the United States, without reference to this proviso or saving clause, are open to the construction that the only tax of any kind, either State or United States, which these associations would be liable to pay, would be the duties to the United States mentioned in the forty-first section, notwithstanding two-thirds of their whole property might consist of real estate, the stock of other corporations, or other property not exempt from taxation by State authority. For every dollar which these associations, or the individual stockholders thereof, should or might loan to the government, such a construction of this act would allow them to hold and enjoy three dollars entirely free, and exempt from taxation by or under State authority. The object, therefore, of this proviso or saving clause, was simply to show that such was

not the meaning or intention of this act, and its province is simply to restrain or qualify the general language made use of in the enacting clause, or in other words, to show that it was the intention of Congress to save and preserve to the several States all those rights of taxation which they possessed before the passage of this act, but which the broad language of the enacting clause might be construed to have taken away. It certainly was not and could not have been the intention of Congress to give to the States by this proviso any new or additional rights, not granted in the body of the act. The province of a proviso or saving clause to a statute is to preserve a *former right*, and not to create a *new one*, and must relate to a thing or right *in esse*. It may restrain or qualify the purview or body of the act, but can never overturn or enlarge it.

Smith's Com. 711.
Boon vs. Joliet, 1 *Scam.* 258.
Sarah vs. Borders, 4 *Scam.* 342.
Blackwell on Tax Titles, 731-745.

That such was the character and province of a proviso or saving clause to an act, the men who penned, and Congress who passed this law very well knew, and they intended it should have the effect we claim for it, and no other. This, we think, the court would be bound to presume, were there nothing in the language of the proviso itself to show that such was the intention of Congress. But in this proviso the language made use of shows beyond all question that Congress intended this proviso should have its usual and ordinary restrictive and qualifying effect, and none other. The language is, "*That nothing in this act* shall be construed to prevent all the "shares in any of the associations, held by any person or body cor- "porate, from being included in the valuation of personal property "of such person or corporation in the assessment of taxes, imposed "by or under state authority," and confines or limits the operation or effect of this proviso to the body or purview of the act to which it is appended exclusively.

It does not say that nothing in this or any prior act of Congress or in the law as it stood before, shall prevent this, but simply, that nothing in this act shall have this effect, showing conclusively, that this proviso was appended to this act simply to restrain or qualify the general and broad language of the enacting clause, and not for the purpose of enlarging it, or of repealing any prior law not expressly, or by a necessary implication, repealed by the body or purview of the act to which it is appended. Such being the object and meaning of this proviso or saving clause, and there being nothing in the enacting clause which gives to the States any new or additional rights of taxation, or which deprives them of any rights of taxation which they possessed before the passage of this act, it follows, as a matter of course, that the law relating to the taxation of government bonds or other property of the United States, by or under State authority, remains the same, in all respects, as it stood before the passage of this act. The act contains no provisions of any kind, which are inconsistent or repugnant to the declaratory law of February 25th, 1862, and consequently cannot operate to repeal or amend the same in any manner, or to change the law as declared to be by said last named act. Repeals by implication are never allowed unless the repugnancy between the acts is so great as to render this result unavoidable.

State vs. Woodside, 9 *Iredell*, 496.
Kinney vs. Mallory, 3 *Alabama*, 626.
Bowen vs. Lease, 5 *Hill*, 221.
Street vs. Commonwealth, 6 *Watts & Sergeant*. 209.

We have seen that there is nothing in the purview of this act that is repugnant to or inconsistent with the declaratory law of February 25th, 1862, and that this proviso, or saving clause, cannot operate to enlarge or give any new or additional rights to those granted in the enacting clause; consequently it follows that the law as it stood before, and as declared to be by the act of February 25th, 1862, still remains unchanged, and that no property exempt from taxation by state authority, under the provisions of said last mentioned act, or by the law as it stood before the passage of said act, has or can

have become liable to taxation by State authority by reason of the passage of the National Banking Law of June 3d, 1864.

But there is another view to be taken of this proviso which quite concludes all discussion on the subject.

We have shown in this argument that these National Banks, being instruments and agencies of the government, and these bonds, constituting one of the means of the government, and vitally and indispensably necessary to the government in the exercise of its expressly granted powers and in carrying on its operations, are exempt from local taxation under State authority.

This exemption exists, as we have said, not by reason of any provision contained in the National Bank Act, nor because of the clause in the Act of February 25th, 1862, authorizing the issuing of those bonds and prohibiting the States from taxing the same. It exists over and above and entirely independent of all those provisions, and by them they are *not made less, nor can they be made more* subject to local assessments.

The source of these exemptions is far back of these provisions. It is found in the Constitution itself. The people of the United States, when they organized the government under the present Constitution, placed therein an everlasting prohibition to the taxation by the States of the powers contained in that instrument, and the means and instruments necessary to the exercise of those powers. The prohibition is not there by the *consent* of the States, or of any State. It is there by the authority of the people of the United States, and it is by their consent alone that it can be taken away. States cannot repeal or disregard it. It is quite beyond their reach. Congress itself cannot abrogate it or prevent its effective operation. These powers, and these means or instruments for their exercise, must forever remain to the Federal Government free and unobstructed, and all Courts in their decisions will be governed accordingly.

"To borrow money on the credit of the United States," is an express power of the Constitution, and one vital to the public safety and defense, and indispensable to the existence and perpetuity of the government. The right to issue these bonds, or other similar contracts, is adjudged, and in fact conceded to be so indispensably necessary, that without it the power to borrow money could not be exercised.

Now if Congress should pass a law purporting to relinquish and grant away the "power" conferred by the Constitution "to borrow money on the credit of the United States," the Supreme Court would hold, and all will concede, that such law would be unconstitutional and void. To admit that Congress had such power, would be to concede that it could legislate away the government of the United States: in other words, Congress could not only destroy itself, but also the judiciary and executive departments, and the government itself.

Now if, instead of directly granting away this power itself, Congress should enact that the States should hereafter have control of the *means necessary* to the *exercise* of that power, and be authorized to burden it by taxation, or otherwise *destroy* it, as they might deem best,—for it will be remembered the power of taxation, where it exists, is of a sovereign character, and may be exercised at will and to any extent,—would not the Supreme Court in like manner, and without hesitation, declare the exercise of such power quite beyond the reach of Congress, and wholly unauthorized? Undoubtedly they must; for the one would be just as unconstitutional as the other, and for the same reasons both alike would be void.

Since, then, it is not within the power of Congress by a direct act for that purpose, to authorize the States to tax the bonds of the government, the courts will not be inclined to, and in fact cannot give such a construction to the proviso of said section forty-one as will produce that effect, which will be done, if the court should hold in this case, that the proviso in question confers authority or license

to the States to lay a tax upon the shares of the bank in question. For we have seen that all the capital stock, surplus funds, and accumulated profits were invested in government bonds, and that a tax upon shares was a tax upon the capital stock, and, when this was invested in bonds, a tax on the bonds themselves.

The proviso must therefore be so construed as to authorize a taxation of the shares of these National banks, so far, and so far only, as the capital and property of the bank is invested in things other than the bonds of the United States.

We may not longer continue this discussion. From what we have said, we are entitled to the following conclusions:

1st. That in the State there is no legislation which will authorize the levy and collection of a tax, on the shares of the Second National Bank of Peoria, in the hands of the holders thereof.

2d. If there were a law in the State purporting to be sufficient for that purpose, it would be unconstitutional and void, and could not be enforced.

3d. That the decision of the Supreme Court of the State of Illinois must be reversed.

WIRT DEXTER.

J. M. WALKER, of Counsel.

CHICAGO, January 24th, 1867.

IN THE

Supreme Court of the U. S.

No. 369.

TOBIAS S. BRADLEY ET AL., PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

ARGUMENT OF JOHN M. PALMER,

For the Defendant in Error.

SPRINGFIELD:
RUNYON & BRITT, BOOK AND JOB PRINTERS.

1867.

In the Supreme Court of the U. S.

No. 369.

TOBIAS S. BRADLEY, ET AL.,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.

ARGUMENT OF JOHN M. PALMER,

FOR THE DEFENDANT IN ERROR.

It is respectfully submitted that of the numerous questions raised by the counsel for the plaintiffs but two can be regarded as still so unsettled as to require discussion.

The Supreme Court of the United States has settled, as far as judicial decisions can determine any question, that the States may, without infringement upon the Federal Constitution, or the acts of Congress, tax the shares of stockholders in the National Banks, and that such shareholders are not entitled to the exemption of their shares from taxation because the whole or a part of the capital stock of such associations is invested in United States securities.

"Van Allen vs. The Collector, 3 Wallace, 573.
The People, &c., vs. Denning Dure, Dec. Term, 1866.
The People, &c., vs. The Commissioners, &c., Dec. Term, 1866."

During the pendency of this cause in the courts of the State of Illinois, it was not thought necessary by the counsel who then represented the defendant to maintain for the State the right to tax the banks organized under the National Banking law, nor the Government securities which are or may become the property of such associations, nor will the attempt be

made here. Those questions, as interesting and important as they are, are beyond the sphere of the case before the court, or if they could be supposed to be in any sense involved, they are already determined by authority too strong to be questioned or shaken.

The States cannot tax the capital or the franchises of the banks, they are protected by the principles of the decisions cited by the counsel for the plaintiffs. They cannot tax the bonds of the United States—they are protected from State taxation by the act of Congress, and by the authority of judicial decisions.

Both of these propositions are distinguishable from the one involved in the argument of this case, and in the Supreme Court of Illinois, and in this court, the proper distinctions have been perceived and vindicated with the utmost possible clearness.

Chief Justice Walker delivering the opinion of the court in this cause. after recognizing the conclusive authority of the decisions in Osborn vs. U. S. Bank, and McCulloch vs. The State of Maryland, adding the concession that the securities of the Government are exempt from taxation, enforces the distinction between the franchises which belong to and are a part of the legal entity—the corporation; the bonds of the Government which, by investment of the funds, become the property of the Association, and the shares which belong to the individual stockholders, and distinct from the corporate property, are the objects of legislation, adjudication, and upon the death of the owner become subject to distribution and descent.

And Mr. Justice Lawrence, in delivering his own concurring opinion, said: "The bonds issued by the General Government are not the subjects of taxation." Yet if the bondholders elect to convert them into bank stock, and thereby come into the exercise of a valuable pecuniary franchise, not possessed by them in the character of mere bondholders, they must do so on such conditions as the act giving this privilege imposes," and this court, in the case of Van Allen vs. The Collector, 3 Wallace, 573, used the following language: "But in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter, and for the purposes for which it was created, can

deal with the corporate property as absolutely as a private individual can deal with his own."

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter, in proportion to the number of his shares, and upon its dissolution or termination, to his proportion of the property that may remain after the payment of its debts. This is a distinct, independent interest or property held by the shareholder, like any other property held by him." This language is quoted and approved by the court in the case of Mead vs. The Commissioners, decided at the present term, and it is added, "of course is subject to like taxation."

These decisions are relied upon as conclusive adjudications that shares in the National Banks are the property of the stockholders distinct from the capital or the franchises of the corporation; distinct from the bonds in which the moneys of such corporations is or may be invested, and are, as the property of such shareholders, subject to State taxation.

The only remaining question which demands attention is whether the revenue laws of the State of Illinois, under which it is proposed to assess and collect taxes upon the shares held by the plaintiffs in the National Banks named in the record are in any respect in conflict with the 41st section of the Act to provide a National Currency.

Before proceeding to any extended consideration of the Constitution and laws of the State of Illinois, relating to the subject, it will be convenient to present them, together with the proviso to the act of Congress, that their full scope and meaning may be readily understood.

STATE CONSTITUTION, ART. 9, SEC. 2.

The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property. Such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct.

Proviso to the 41st Section of the Currency Act.

Provided.—That nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate, from being included in the valua-

tion of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

Provided further,—That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located.

Provided, also,—That nothing in this act shall exempt the real estate of associations from either State, County or municipal taxes to the same extent according to its value as other real estate is taxed.

AN ACT FOR THE ASSESSMENT OF PROPERTY, ACTS OF 1853.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That all property, whether real or personal, in this State; all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, of persons residing in this State, or used or controlled by persons residing in this State; the property of corporations now existing or hereafter created, and the property of all banks, or banking companies, now existing, or hereafter created, and of all bankers and brokers, except such property as is hereinafter expressly exempted, shall be subject to taxation; and such property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, or the value thereof, shall be entered on the list of taxable property, for that purpose, in the manner prescribed in this act.

DEFINITIONS.

§ 2. The terms "real property" and "land," wherever used in this act, shall be held to mean and include not only the land itself, whether laid out in town lots or otherwise, with all things contained therein, but, also, all buildings, structures and improvements, and other fixtures, of whatsoever kind, thereon, and all rights and privileges belonging or in any wise pertaining thereto. The term "investments in bonds," wherever used in this act, shall be held to mean and include all moneys invested in bonds, of whatsoever kind, whether issued by corporate or unincorporate companies, towns, cities, counties, States, or other corporations, or by the United States, held or controlled by persons residing in this State, whether for themselves, or as guardians, trustees or agents, on which the holder thereof is receiving or is entitled to receive interest. The term "investment in stocks" wherever used in this act, shall be held to mean and include all moneys invested in the public stocks of this or any

other State, or of the United States, or in any association, corporation, joint-stock company, or otherwise, the stock or capital of which is or may be divided into shares, which are transferable by the owner, without the consent of the other partners or stock-holders, for the taxation of which no special provision is made by this act.

§ 6. Each person required to list property, shall make out, sign, and deliver to the assessor, when required, a certified statement of all the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, in his possession, or under the control of such person, which he is required to list for taxation, either as owner or holder thereof, or as guardian, parent, husband, trustee, executor, administrator, receiver, accounting officer, partner, agent or factor.

§ 10. * * * * Investments in bonds, stocks, joint-stock companies, or otherwise, shall be valued at the true value thereofin money. * * * *

AN ACT TO ESTABLISH A GENERAL SYSTEM OF BANKING.

§ 10. The shares of said association shall be deemed personal property, subject to taxation, and shall be transferable on the books of the association; * * * every person becoming a share-holder by such transfer, shall, in proportion to his shares, succeed to all the rights and liabilities of share-holders by whom the transfer was made. No change shall be made in the articles of association, or of the share-holders or members thereof, by which the right, remedies or securities of its existing creditors shall be impaired. Such association shall not be dissolved by the death or insanity of any of the share-holders therein, when there is more than one share-holder in such association. Taxes shall be levied on and paid by the corporation, and not upon the individual stock-holders; the value of the property to be ascertained annually by the bank commissioners herein provided for; and the rate of taxation shall be the same as that required to be levied upon other taxable property by the revenue laws of the State.

AN ACT TO AMEND "AN ACT TO ESTABLISH A GENERAL SYSTEM OF BANKING ACTS OF 1857.

§ 6. The capital stock of every bank or banking association paid in or secured to be paid in, except so much thereof as is invested in real estate, which shall be taxed as real estate as herein provided, together with its surplus profits or reserved funds, and also the real estate of every such company, shall be listed by the president or cashier thereof, and assessed and taxed in the same manner as the other personal and real estate of the county and towns in which such bank or banking association is located.

Whatever diversity of opinion there may be as to the existence of the power claimed for the State to tax the shares in the National Banks, no one will, it is presumed, insist that the exercise of such power is prohibited by the act of Congress to which these associations owe their existence Congress, by the proviso to the 41st Section, certainly intended to avoid the possible inference of a purpose to protect the shares from taxation. So much may be fairly assumed, nor will it be seriously claimed, whatever may be said of the effect of the proviso upon the power of the States over the subject that it was intended to regulate, or even indicate the methods which should be adopted by the States for fixing or collecting such taxes as might be imposed upon shares in National Banks by their own authority.

The first proviso is a recognition on the part of Congress of the right of the States to tax the shares in these associations, and the recognition by the Legislature of the existence of a right has frequently the force of a declaratory law, but it is more than a recognition, for as shares in National Banks are created by the acts of Congress as parts of machinery intended for national purposes, which, being property in the hands of citizens of the States might escape taxation under the shelter of Federal laws or Federal policy; it is the withdrawal of that protection and the expression of the consent of the National Government that the States might comprehend this new species within their revenue laws.

But while it is clear that this consent has brought the shares in the banks within the powers of the States, it is equally clear that the powers of the States over them are limited by the terms which are,(by the language in which that consent is given)inseparably connected with it "that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State, where such association is located."

This only limitation applies to the rate of taxes to be imposed, to the amount to be collected, while the methods of assessment and collection are left to be regulated by each State according to ts own measure of policy and convenience.

It is apparent upon a statement of the proposition that neither the National Government, the creator of this species of property,

nor the share-holders can be interested in the methods which may be adopted by the State for the imposition of the tax.

The objects of the Government and the rights of the share-holders are secure under any modes which only impose the same rate of taxation upon the shares, that is imposed upon the shares in any banks organized under the laws of the State.

This question disposed of, the inquiry arises: do the laws of Illinois impose or is it proposed under those laws to collect from the plaintiffs any greater rate of taxation than is imposed upon share-holders in State institutions.

If the revenue laws of Illinois, can be construed to operate unfavorably to the National Banks in respect to the rate of taxation, they are void. not only on account of their conflict with the 41st Section of the act of Congress, but because they contravene the Constitution of the State, for the act of Congress and the State Constitution alike require equality in the rate of taxation.

This conflict does not exist, the harmony of the revenue law of the State with the State Constitution was authoritatively settled by the Supreme Court of Illinois in this case. That is a question relating to the construction of the State Constitution and State laws which is not subject to review in any other court or place.

The Supreme Court of Illinois as will hereafter be seen, not only established by its authority, that the law of the State taxing the shares in National Banks is valid, when tested by the State Constitution, but asserted the conformity of those laws with the act of Congress and though that portion of the decision is not authority in this court, it is a construction of the State laws binding upon all inferior courts and officers, of the State and compels their acquiescence. In the decision of the case, the laws of the State are contrasted with the laws of the United States, the paramount obligation of the National Statute is admitted, and the perfect conformity of the State law is established.

The Chief Justice in delivering the opinion said: "Under our Constitution and of course under our revenue laws the rate of taxation must be equal, and must be imposed according to value, and this too in regard to every species of taxable property, so if the second proviso of the act of Congress could have any binding force it would be inapplicable under our revenue system."

The shares of stock in our State banks must, under their charter, be liable to taxation, without regard to the character of

the bonds they have deposited with the auditor, or of the character of the funds in which their capital or earnings may be invested. If the bonds deposited with the auditor, and the bills received from him for circulation, the net earnings of the banks, their deposits, and all other means at their control, were invested in bonds exempt from taxation, the shares of their capital stock would still be liable to be taxed by the State, because they have so agreed, on a sufficient consideration, and no one can say that such an agreement is not fully authorized.

It then follows, that when the shares of the stock of our State banks are taxed, on their value, and at the same rate of taxation as that imposed upon the shares of the National Banks, that both are taxed at the same rate. Under such taxation each pays upon the full amount of the shares in their capital stock, or rather it is paid by the share-holders. Thus it will be seen that there is, and can be, no discrimination made unless required by the State laws, and in our State none such do, or ever can exist, as our Constitution prohibits their enactment by requiring all taxes to be imposed at an equal rate upon the value of the property taxed.

The second proviso, if it were operative, could, therefore, have no effect in this State.

Our banking law, which was adopted in 1851, and under which our banks were all organized, by the 10th section declares that "the shares of said association shall be deemed personal property, subject to taxation and shall be transferable, on the books of the association, in such manner as may be agreed on in the articles of the association. * * * Taxes shall be levied on, and paid by the corporation, and not upon the individual share-holders; the value of the property to be ascertained annually by the bank commissioners herein provided for; and the rate of taxation will be the same as that required to be levied on other taxable property, by the revenue laws of the State." This Section provides, as it will be observed, first, that the shares may be taxed, but indicates no mode in which it shall be done, but leaves it to be effected by the revenue laws. But the second clause of the section requires the property of the bank to be valued by the bank commissioners annually, and taxed at the same rate as other property, and to be assessed to the bank and not to the share-holders.

Under this mode of assessing the shares, it seems to have been found from experience that share-holders in these institutions escaped taxation by failing to list their shares, and, the State being thus deprived of its revenue, it was supposed that a more certain and efficacious mode should be adopted to prevent the fraud. That the individual share-holders might be reached for taxation, the law was on the 14th of February, 1857, amended by the Legislature. This is the provision then adopted:

"The capital stock of every bank or banking association paid in or secured to be paid in, except so much thereof as is invested in real estate, which shall be taxed as real estate, as herein provided, together with its surplus profits as reserved funds, and also, the real estate of every such company, shall be listed by the president or cashier thereof, and assessed and taxed in the same manner as the other personal and real estate of the county, in the town in which such banking association is located. (Scates' comp., 129, Sec. 6.) This amendment made no substantial change in the mode of taxing the capital of these banks. The original law required the shares to be taxed to the several share-holders, and the amendment requires all of the capital stock to be assessed and taxed to the corporation.

Under the original law, representing the capital stock, when assessed, produced precisely the same result as when the capital stock is taxed. The amount assessed by either mode is precisely the same. The shares represent the capital stock, and the capital stock represents the shares. If listed by the share-holder he would pay the tax directly, and if listed by the bank he would pay the same amount indirectly, as in that case the bank would apply, for that purpose, what would otherwise go to the share-holder as a portion of his dividend on his stock. It only accomplishes the same end in a different mode. It is, in this case, a tax on the shares of the capital stock and at the same rate.

Thus it will be seen that these shares are taxed, and at the same rate as the shares of the banks created by the national banking law. So that whether the State may exercise the right of taxation independent of Congress, or under the second proviso in the 41st Section of the National Banking Law, can make no difference under our constitution and revenue laws, as in no event can the shares in our local banks be taxed at a different rate from the shares in the National Banks under existing State legislation. Where all the shares in a National Bank are taxed, it can only equal the value of its capital stock, and that is the measure of the amount required to be assessed on the stock of our State banks.

The 10th Section of the revenue laws of 1858 (Scates' comp., 1,033,) declares that: "Personal property of every description shall be valued at the usual selling price of similar property at the time of listing, and in the county where the same may then be." * * * "Investments in stocks, bonds, joint-stock companies, or otherwise, shall be valued at the true value thereof in money." The term "investments in stocks" manifestly embraces shares in the capital stock of banks and banking associations and there can be no question that shares in the capital stock of national banking associations are as fully embraced as others. It would be a perversion of language to hold otherwise. These

terms are used in their broadest and most unlimited sense, and without any qualification.

It was not denied that this provision was sufficiently comprehensive to embrace such shares, but it was insisted that under the provisions of the national banking law they could only be taxed in the same manner that similar shares in the State banks are taxed; inasmuch as shares in State banks are not taxed, that these shares are exempt. We have seen that the shares of the capital stock of our banks are taxed through the corporation, and the reason, therefore, fails. Had the second proviso of the 41st Section not been inserted, no person would ever have supposed, that such shares could have not been assessed and taxes imposed under the existing legislation of our State, as it in every sense requires and produces equality in the taxation of the shares, of both descriptions of banks, as to valuation and the rate imposed.

It then follows that these shares were liable to be assessed in the mode adopted by the township assessor, and inasmuch as no question was made as to the value placed upon them, we must conclude that they were not overvalued. And when assessed under our revenue laws, the tax will be at the same rate that is imposed upon other property assessed in the same municipal division in which the share-holders reside. This is required by the Constitution and laws, and the requirement must be observed.

This opinion declares the construction of the statutes of the State and deduces from such construction the result, which the counsel admits is a proper one, if shares in the National Banks are subject to State taxation. The opinion establishes the true construction of the State laws by force of authority, an authority that cannot be questioned in the State where these laws are to be administered.

It is respectfully submitted that the points here presented and argued are alone involved, and if the views of the defendant are adopted by this Court, the affirmance of the judgment of the Supreme Court logically follows.

John M Palmer

for the Defendant in Error